Supreme Court, U.S.
FILED
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CLERK

No. 99-1871

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: MAY 22, 2000
CERTIORARI GRANTED: SEPTEMBER 26, 2000

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON (MEDFORD)

Civil Docket No. 96-CV-3077

KLAMATH WATER USERS

v.

DEPARTMENT OF INTERIOR, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/22/96	1	COMPLAINT (Cause Code: 05:0552fi) Receipt # 7599 (cwm) [Entry date 10/23/96]
		* * * * *
12/4/96	10	ANSWER by Defendants to complaint [1-#1] (cwm) [Entry date 12/15/96]
		* * * * *
3/31/97	21	NOTICE by Defendants of filing of Vaughn Index (cwm) [Entry date 04/01/97]

DATE	DOCKET NUMBER	PROCEEDINGS
3/31/97	22	MOTION by Defendant FOR SUMMARY JUDGMENT (cwm) [Entry date 04/03/97]
		* * * * *
4/15/97	25	RESPONSE by Plaintiff to MOTION FOR SUMMARY JUDGMENT [22-1] (cwm) [Entry date 04/21/97]
		* * * * *
6/19/97	44	FINDINGS AND RECOMMENDATION THAT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [22-1] SHOULD BE GRANTED (Counsel notified) (cwm) [Entry date 06/24/97]
		* * * * *
8/4/97	48	OBJECTION to FINDINGS AND RECOMMENDATION by Plaintiff [44-1] (cwm) [Entry date 08/05/97]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/16/97	53	ORDER by Honorable Michael R. Hogan ADOPTING FINDINGS AND RECOMMENDATION [44-1] and GRANTING MOTION FOR SUMMARY JUDGMENT [22-1] Signed 10/16/97 (counsel notified) (wk) [Entry date 10/22/97]
10/28/97	54	JUDGMENT DISMISSING CASE (counsel notified) (wk)
		* * * * *
12/24/97	58	NOTICE OF APPEAL to Court of Appeals by Plaintiff from judgment Receipt # 8400 (wk)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-36208

KLAMATH WATER USERS

v.

DEPARTMENT OF INTERIOR, ET AL.

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
6/29/98	Filed original and 15 copies Appellant Klamath Water Users opening brief (Informal: n) 45 pages and five excerpts of record in 3 volumes; served on 6/26/98 [97-36208] (hh)
	* * * * *
8/17/98	Filed original and 15 copies appellees DOI and Bureau of Indian Affairs' 62 pages brief; served on 8/12/98 [97-36208] (hh)
	* * * * *

DATE	PROCEEDINGS
3/3/99	ARGUED AND SUBMITTED TO Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer [97-36208] (br)
8/31/99	FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Andrew J. KLEINFELD; Michael D. HAWKINS, dissenting; William W. Schwarzer, author.) FILED AND ENTERED JUDGMENT. [97-36208] (hh)
	* * * * *
10/15/99	[3772950] Filed original and 50 copies Appellee DOI petition for rehearing with suggestion for rehearing en banc; 15 p.pages, served on 10/14/99 (PANEL AND ALL ACTIVE JUDGES) [97-36208] (hh)
10/22/99	Received original and 50 copies Amici Curiae National Congress of American Indians, et al., amici brief of 8 pages; served on 10/21/99 (deficient: motion pending/PANEL) [97-36208] (hh)

DATE	PROCEEDINGS
10/22/99	Filed Amici Curiae National Congress of American Indians, et al., motion for leave to file brief amici curiae in support of defts/aples' petition for rehearing with suggestion of rehearing en banc; served on 10/21/99 [3777446] (to PANEL only) (hh)
10/22/99	Received original and 50 copies Amici Curiae Lummi Nation, Zuni Indian Tribe, Pechanga Indian and Tohono O'Odham Nation's amici curiae brief of 8 pages; served on 10/21/99 (deficient: motion pending/PANEL) [97-36208] (hh)
10/22/99	Filed Amici Curiae Lummi Nation, Zuni Indian Tribe, Pechanga Indian and Tohono O'Odham Nation's motion for leave to file brief as amici curiae supporting the US's petition for rehearing and suggestion for rehearing en banc; served on 10/21/99 [3777473] (to PANEL only) (hh)

DATE	PROCEEDINGS
11/3/99	Filed order (Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer,): Lummi Nation, et al, and National Congress of American Indians, et al, motions for leave to file brief as amici curiae in support of defts-aples' petition for rehearing and petition for rehearing en banc are GRANTED. The clerk shall file the briefs. [97-36208] (hh)
11/3/99	Filed original and 50 copies Amici National Congress of American Indians, et al., amici curiae brief of 8 pages; served on 10/21/99 (PANEL-AND ALL ACTIVE JUDGES) [97-36208] (hh)
11/3/99	Filed original and 50 copies Amici Lummi Nation, Zuni Indian Tribe, Pechanga Indian and Tohono O'Odham Nat.'s amici curiae brief of 8 pages; served on 10/21/99 (PANEL AND ALL ACTIVE JUDGES) [97-36208] (hh)
12/22/99	Filed order (Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer,): . . . The petition for rehearing and petition for rehearing en banc is DENIED. [97-36208] (hh)

DATE	PROCEEDINGS
12/27/99	Filed aples DOI and Bureau of Indian Affairs' motion for a stay of the mandate; served on 12/23/99 [3817702] (to PANEL) (hh)
	* * * * *
1/26/00	Filed order (Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer,): The motion of aples for a 90-day stay of the mandate, to 3/28/00, is GRANTED. The unopposed motion of aplt for an ext of time within which to file a request for attys' fees until 14 days after the deadline for aples to file a petition to the US Supreme court for a writ of certiorari, or until 14 days after the disposition of any such filed petition, is GRANTED. [97-36208] (hh)
3/16/00	Filed DOI and Bureau of Indian's consent motion for a further stay of the mandate, served on 3/15/00 [3869303] (LEAD JUDGE) (sm)
3/16/00	Received letter from the Supreme Court dated 3/10/00 re: extending the time to file petn for writ of cert to and including 4/20/00. (to AJK) [97-36208] (crw)

DATE	PROCEEDINGS
4/12/00	Filed order (Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer,): The consent motion for a further stay of the mandate, to 4/27/00, is GRANTED. [97-36208] (hh)
4/17/00	Filed Supreme Court order (SC Date: 04/10/00), granting application for a further extension of time within which to file a petition for writ of certiorari to and including 05/20/00 (CASEFILE) [97-36208] (sm)
4/17/00	Filed DOI and Bureau of Indian's consent motion to stay the mandate until 05/27/00. Served on 4/14/00 [3891935] (LEAD JUDGE) (sm)
4/25/00	Filed order (Andrew J. KLEINFELD,): Aples' consent motion for a further stay of mandate, to 5/27/00, is GRANTED. [97-36208] (hh)
5/30/00	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 99-1871 filed on 5/22/00. [97-36208] (sm)
	* * * * *

DATE	PROCEEDINGS
10/2/00	Received notice from Supreme Court, petition for certiorari GRANTED on 9/26/00. Supreme Court No. 99-1871 (PANEL) (hh)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF INDIAN AFFAIRS, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(Freedom of Information Act;
Administrative Procedure Act)

[Oct. 22, 1996]

Plaintiff Klamath Water Users Protective Association (hereinafter 'plaintiff') alleges as follows:

JURISDICTION AND VENUE.

1. This is an action brought under the Freedom of Information Act (5 U.S.C. § 552 *et seq.*), as amended, and the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*), as amended, to enjoin the United States Department of Interior and the United States Bureau

of Indian Affairs (hereinafter "Defendants") from withholding from public disclosure certain records within their possession and control, and to direct that Defendants disclose such records to Plaintiff and grant Plaintiff's related fee waiver requests.

2. This court has jurisdiction over the claims against the Defendants pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 702, and 28 U.S.C. §§ 1331, 1361, 2201-2202.

3. Venue of this action properly lies within the District of Oregon, pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. section 1391(e).

PARTIES

4. Plaintiff Klamath Water Users Protective Association, also known as Klamath Water Users Association, is a tax-exempt, non-profit corporation organized under the laws of the State of Oregon and section 501(c)(5) of the Internal Revenue Code. Plaintiff's principal place of business is located in Klamath Falls, Klamath County, Oregon. Plaintiff is an association of individuals, firms, and public entity districts and public entity corporations who are located in Oregon and California within the Upper Klamath River Basin, as defined in the Klamath River Basin Compact. Plaintiff's members receive water from facilities constructed as part of the United States Bureau of Reclamation's ("Reclamation") Klamath Project. Plaintiff's purposes include the protection of its members' common interests in the use of water for irrigation, and the provision of information to its members and the persons represented by its members. Plaintiff has the legal authority to bring this action.

5. Defendant Department of Interior is an agency of the United States government. Defendant Bureau of Indian Affairs is a Bureau within the Department of Interior, under the supervision of the Secretary of Interior. Defendants have possession of the records to which Plaintiff seeks access.

GENERAL ALLEGATIONS

6. In February of 1995, Reclamation, an agency within the Department of Interior, announced that it would develop a plan, to be known as the Klamath Project Operations Plan ("KPOP"), to describe the future operation of the Klamath Project. Reclamation proposed in the KPOP, irrespective of state law concerning the diversion, appropriation, and distribution of water, to reallocate water away from agricultural use. Reclamation and Defendant Department of Interior represented to Plaintiffs and the public that the process for developing the KPOP would be an open, public process.

7. On information and belief, Plaintiff alleges that before, during, and after the development of the proposed KPOP, and at all relevant times, numerous persons, agencies, tribes and organizations attempted to influence Reclamation to make decisions that would allocate water away from irrigation use within the Klamath Project. Such persons included representatives of the Klamath Tribes, the Hoopa Valley Tribe, the Yurok Tribe, and the Karuk Tribe, including their attorneys and consultants (hereinafter collectively referred to as "Klamath Basin Tribes"). Such persons also included and include employees of Defendant Bureau of Indian Affairs. On information and belief, Plaintiff alleges that in the development of the proposed KPOP, Reclamation either proposed to quantify

federal reserved water rights and water rights acquired under state laws or proposed to allocate water to instream use for the benefit of Klamath Basin Tribes based on considerations other than water rights.

8. Reclamation informed the Plaintiff and the public that it would release a draft KPOP for public comment in February of 1996, and a final KPOP in March of 1996. Reclamation did not issue a KPOP as planned and represented. Upon information and belief, Plaintiff alleges that Reclamation's Area Manager prepared a draft KPOP in February of 1996 to be released for public comment, but release was withheld because of objections of dissatisfied persons within the Defendant Bureau of Indian Affairs or Defendant Department of the Interior who persuaded the United States Secretary of the Interior and/or the Office of the Secretary to prevent such release.

9. In February and March of 1996, Plaintiff submitted to Defendants, under the Freedom of Information Act, written requests for access to certain documents within Defendants' possession, and for a waiver of associated fees. These written requests sought documents evincing communications that occurred between Defendants and the Klamath Basin Tribes from January 15, 1996 through February 29, 1996, and that related to water resource issues in the Klamath River Basin. Copies of these written requests are attached hereto as Exhibit 1, and are incorporated herein by reference.

10. By letter dated June 25, 1996, Defendants issued a partial denial of Plaintiff's February and March 1996 requests. Among other things, said denial reveals frequent contact and communication between the

Klamath Basin Tribes and the Defendant Bureau of Indian Affairs immediately before, during and after the draft KPOP was being reviewed within the Department of Interior. In their denial, Defendants alleged that most of the requested documents were exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5) (hereinafter "FOIA exemption 5"). Defendants also denied Plaintiff's request for a fee waiver. This fee waiver denial was based upon Defendant's erroneous determination that the information requested was primarily in Plaintiff's commercial interest. As a result, Defendants wrongfully determined that Plaintiff's request does not meet the statutory fee waiver test set forth in 5 U.S.C. § 552(a)(4)(iii) and the United States Department of Interior regulations (hereinafter "DOI regulations") 43 C.F.R. § 2.21(a)(1)(ii). Defendants, therefore, erroneously applied the provisions of DOI regulations, 43 C.F.R. § 2.20(b) in determining the amount of fees applicable to Plaintiff's request, and issued a corresponding Bill for Collection in the amount of $95.47, which Plaintiff has not paid pending resolution of this litigation. A copy of Defendants' June 25, 1996 denial (without the released documents) is attached hereto as Exhibit 2, and is incorporated herein by reference.

11. By letter dated July 18, 1996, Plaintiff timely filed an administrative appeal to Defendants' denial in accordance with 5 U.S.C. § 552(a)(6)(A), and DOI regulations 43 C.F.R. § 2.18. A copy of this appeal (without enclosures) is attached hereto as Exhibit 3, and is incorporated herein by reference.

12. By letter dated August 20, 1996, Defendants issued a final denial of Plaintiff's February and March 1996 Freedom of Information Act requests for the

withheld records and Plaintiff's corresponding fee waiver request. A copy of this final denial is attached hereto as Exhibit 4, and is incorporated herein by reference.

13. Subsequent to the decision not to release the draft KPOP that had been planned for release in February or March of 1996, Reclamation commenced a new effort to prepare a KPOP. Reclamation also announced certain other decisions or plans with respect to water resources in the Klamath Basin that affect the interests of Plaintiff and its members.

14. By letters dated July 3, 1996, Plaintiff submitted to Defendants, under the Freedom of Information Act, written requests for access to certain documents within Defendants' possession, and for a waiver of associated fees. These written requests similarly sought documents evincing communications that occurred between Defendants and the Klamath Basin Tribes from January 1, 1996 through January 14, 1996, and March 1, 1996 through July 3, 1996, and that related to water resource issues in the Klamath River Basin. Copies of these written requests are attached hereto as Exhibit 5, and are incorporated herein by reference.

15. By letter dated August 2, 1996, Defendants denied Plaintiff's request for a fee waiver associated with Plaintiff's July 3, 1996 Freedom of Information Act requests. This denial was based upon Defendants' erroneous determinations that the information requested was primarily in Plaintiff's commercial interest, and was primarily informative to a narrow segment of persons rather than the general public. As a result, Defendants wrongfully determined that Plaintiff's request does not meet the statutory fee waiver test set

forth in 5 U.S.C. § 552(a)(4)(A)(iii) and DOI regulations 43 C.F.R. § 2.21(a)(1)(ii). Defendants, therefore, erroneously applied the provisions of DOI regulations 43 C.F.R. § 2.20(b) in determining the amount of fees applicable to Plaintiff's request, and issued a corresponding Bill for Collection in the amount of $240.29. Plaintiff paid this amount under protest and with Defendants' agreement that the payment would be refunded if Plaintiff's waiver request was upheld in an administrative appeal or litigation. Copies of Defendants' August 2, 1996 denial and the corresponding Bill for Collection are attached hereto as Exhibit 6, and are incorporated herein by reference.

16. By letter dated August 5, 1996, Plaintiff timely filed an administrative appeal to Defendants' fee waiver denial in accordance with 5 U.S.C. § 552(a)(6)(A), and DOI regulations 43 C.F.R. § 2.18. A copy of this appeal (without enclosures) is attached hereto as Exhibit 7, and is incorporated herein by reference.

17. By letter dated September 6, 1996, Defendants issued a final denial of Plaintiff's July 3, 1996 fee waiver request. A copy of this final denial is attached hereto as Exhibit 8, and is incorporated herein by reference.

18. By letter dated September 4, 1996, Defendants issued a partial denial of Plaintiff's July 3, 1996 Freedom of Information Act requests, wherein Defendants similarly alleged that most of the requested documents were exempt from disclosure pursuant to FOIA exemption 5. The denial reveals frequent contacts between Defendants and the Klamath Basin Tribes that relate to the vital interests of Plaintiff and its members. A copy of Defendants' September 4, 1996 denial

(without the released documents) is attached hereto as Exhibit 9, and is incorporated herein by reference.

19. By letter dated September 13, 1996, Plaintiff timely filed an administrative appeal to Defendants' partial denial in accordance with 5 U.S.C. § 552(a)(6)(A), and DOI regulations 43 C.F.R. § 2.18. A copy of this appeal (without enclosures) is attached hereto as Exhibit 10, and is incorporated herein by reference.

20. On information and belief, Plaintiff alleges that Defendants received Plaintiff's September 13, 1996 administrative appeal on September 16, 1996. Defendants have failed to make a final determination with respect to said appeal within the applicable time limit provisions of 5 U.S.C. § 552(a)(6)(A)(ii), and therefore, pursuant to 5 U.S.C. § 552(a)(6)(c), Plaintiff has exhausted its administrative remedies.

21. Plaintiff has no commercial purpose or interests, and will not profit from the information requested. Plaintiff directly and indirectly provides information and resources for several thousand persons interested in the water resources of the Klamath River basin. The information requested, if disclosed by Defendants, will be maintained in Plaintiff's library and made available to any member of the public. Thus, any persons desiring to review the requested information would be able to learn about and understand Defendants' activities.

22. Plaintiff has exhausted its administrative remedies as to each claim for relief asserted herein.

23. Plaintiff has employed attorneys to represent it in this action, and has incurred and will continue to incur expenses for attorneys' fees and costs herein.

FIRST CLAIM FOR RELIEF
(FOIA Violation - Injunction - Withheld Records)

24. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 23 of this complaint.

25. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(3), Plaintiff has a right of access to all of the records requested in the aforementioned Freedom of Information Act requests. The requested records were and are identifiable records within the meaning of the Freedom of Information Act. Defendants' refusals to disclose the requested records were and are wrongful decisions without adequate legal basis, and Plaintiff is entitled to the relief provided by the Freedom of Information Act.

26. Unless Defendants are restrained and enjoined from their wrongful refusal to disclose the requested records, and are directed to disclose such records to Plaintiff, Plaintiff will be irreparably injured.

27. Plaintiff has no plain, speedy or adequate remedy at law.

SECOND CLAIM FOR RELIEF
(FOIA Violation - Injunction - Fee Waiver)

28. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 27 of this complaint.

29. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii), and the DOI regulations 43 C.F.R. § 2.21(a)(1)(ii), Plaintiff was and is eligible for a waiver of fees related to Defendants' disclosure of the requested records. Defendants' refusals to waive the fees were and are wrongful decisions without adequate legal basis, and Plaintiff is entitled to the relief provided by the Freedom of Information Act.

30. Unless Defendants are restrained and enjoined from their wrongful refusal to grant Plaintiff's request for a waiver of fees, Plaintiff will be irreparably injured.

31. Plaintiff has no plain, speedy or adequate remedy at law.

THIRD CLAIM FOR RELIEF
(FOIA Violation - Judicial
Declaration - Withheld Records)

32. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 31 of this complaint.

33. An actual controversy has arisen and now exists between Defendants and Plaintiff regarding the application of FOIA exemption 5 to each of the requested records that Defendants have withheld from disclosure. Plaintiff, therefore, desires a judicial declaration that the provisions of FOIA exemption 5 do not apply to any or all of the requested records that Defendants have withheld from disclosure.

FOURTH CLAIM FOR RELIEF
(FOIA Violation - Judicial
Declaration - Fee Waiver)

34. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 33 of this complaint.

35. An actual controversy has arisen and now exists between Defendants and Plaintiff regarding the application of 5 U.S.C. § 552(a)(4)(A)(iii), and the DOI regulations 43 C.F.R. §§ 2.21(a)(1)(ii) and 2.20(b), in the context of Defendants' determinations as to Plaintiff's fee waiver requests. Plaintiff, therefore, desires a judicial declaration that Plaintiff's Freedom of Information Act requests meet the criteria for granting a fee waiver under the Freedom of Information Act and said DOI regulations, and that Defendants must grant Plaintiff's requested fee waivers.

FIFTH CLAIM FOR RELIEF
(APA Violation)

36. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 35 of this complaint.

37. Defendants' refusal to disclose the requested records and waive the corresponding fees, and Defendants' determinations with respect to such actions, are arbitrary and capricious, not supported by evidence, and inconsistent with law.

38. Unless Defendants are restrained and enjoined from such arbitrary and capricious actions with respect to Plaintiff's Freedom of Information Act requests, Plaintiff will be irreparably injured.

39. Plaintiff has no plain, speedy or adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

ON THE FIRST AND FIFTH CLAIMS FOR RELIEF:

1. For a temporary, preliminary, and permanent injunction prohibiting Defendants from withholding from Plaintiff the requested records referred to and described herein.

2. For a temporary, preliminary, and permanent injunction directing Defendants to disclose and make available to Plaintiff the requested records referred to and described herein.

ON THE SECOND AND FIFTH CLAIMS FOR RELIEF:

3. For a temporary, preliminary, and permanent injunction directing Defendants to grant the requested fee waivers related to Plaintiff's Freedom of Information Act requests.

ON THE THIRD CLAIM FOR RELIEF:

4. For a judicial declaration that the provisions of FOIA exemption 5 do not apply to any or all of the requested records that Defendants have withheld from disclosure, and that Defendants, therefore, have violated the Freedom of Information Act.

ON THE FOURTH CLAIM FOR RELIEF:

5. For a judicial declaration that Plaintiff's Freedom of Information Act requests meet the criteria for granting a fee waiver under the Freedom of Information Act and said DOI regulations, and that Defendants must grant Plaintiff's requested fee waivers.

ON ALL CLAIMS FOR RELIEF:

6. For reasonable attorneys' fees as provided for pursuant to applicable law including, but not limited to, 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412 *et seq.*

7. For costs of suit herein; and

8. For such other relief as the Court deems just and proper.

Dated: October 22, 1996

By /s/ RICHARD S. FAIRCLO
RICHARD S. FAIRCLO, OR Bar #75114
of Attorneys for Plaintiff

DE CUIR & SOMACH
A Professional Corporation

Dated: October 17, 1966
By /s/ ANDREW M. HITCHINGS
ANDREW M. HITCHINGS, CA
Bar #154554
of Attorneys for Plaintiff

DE CUIR & SOMACH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
400 CAPITOL MALL
SUITE 1900
SACRAMENTO, CA 95814-4407
TELEPHONE (916) 446-7979
FACSIMILE (916) 446-8199

February 27, 1996

Director, Office of Administration
Bureau of Indian Affairs
ATTN: FREEDOM OF INFORMATION
ACT REQUEST
U.S. Department of the Interior
Washington, D.C. 20240

Dear Freedom of Information Act Officer:

This is a Freedom of Information Act request.

As used in this request, the term "Klamath Basin Tribes" means each of the Klamath Tribes, the Hoopa Tribe, the Karuk Tribe, the Yurok Tribe, and their members, officers, agents, attorneys, consultants, employees, and any other person communicating on behalf of the listed Indian tribes.

Please provide me with any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes during the period January 15, 1996 through February 29, 1996. This includes, but is not limited to, any letter,

memorandum, facsimile transmission, meeting notes or notes of telephone conversation or any other conversation, meeting attendance lists, telephone logs, or any document of any kind, regardless of authorship, provided to or received from the Klamath Basin Tribes, or any other document that is evidence of a communication with the Klamath Basin Tribes.

Please notify me within ten days whether you will comply with this request. If any documents or record is not provided, please describe the document and FOIA exemption that you believe is applicable.

This request is on behalf of the Klamath Water Users Association. The Klamath Water Users Association is a tax-exempt corporation organized under section 501(c)(5) of the Internal Revenue Code and should thus be exempt from fees. If you determine that the request is not exempt from fees, then the fee category of "other requests" in 43 C.F.R. section 2.20(e) applies, and the fee schedule should be determined accordingly. Please advise me in advance if the cost for complying with this request would exceed $50.

Cordially yours,

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS
Attorney

PSS/jlp

cc: David Zepponi

DE CUIR & SOMACH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
400 CAPITOL MALL
SUITE 1900
SACRAMENTO, CA 95814-4407
TELEPHONE (916) 446-7979
FACSIMILE (916) 446-8199

March 26, 1996

Kate Vandemoer
Office of the Assistant Secretary
Department of the Interior
1849 C Street, NW
M.S. 6640
Washington, DC 20240

Dear Dr. Vandemoer:

This is a Freedom of Information Act request.

As used in this request, the term "Klamath Basin Tribes" means each of the Klamath Tribes, the Hoopa Tribe, the Karuk Tribe, the Yurok Tribe, and their members, officers, agents, attorneys, consultants, employees, and any other person communicating on behalf of the listed Indian tribes.

Please provide me with any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes during the period January 15, 1996 through February 29, 1996. This includes, but is not limited to, any letter,

memorandum, facsimile transmission, meeting notes or notes of telephone conversation or any other conversation, meeting attendance lists, telephone logs, or any document of any kind, regardless of authorship, provided to or received from the Klamath Basin Tribes, or any other document that is evidence of a communication with the Klamath Basin Tribes.

Please notify me within ten days whether you will comply with this request. If any document or record is not provided, please describe the document and FOIA exemption that you believe is applicable.

This request is on behalf of the Klamath Water Users Association. The Klamath Water Users Association is a tax-exempt corporation organized under section 501(c)(5) of the Internal Revenue Code and should thus be exempt from fees. If you determine that the request is not exempt from fees, then the fee category of "other requests" in 43 C.F.R. section 2.20(e) applies, and the fee schedule should be determined accordingly. Please advise me in advance if the cost for complying with this request would exceed $50.

Cordially yours,

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS
Attorney

PSS/jlp

cc: David Zepponi

DE CUIR & SOMACH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
400 CAPITOL MALL
SUITE 1900
SACRAMENTO, CA 95814-4407
TELEPHONE (916) 446-7979
FACSIMILE (916) 446-8199

March 26, 1996

Director, Office of Administration
Bureau of Indian Affairs
ATTN: FREEDOM OF INFORMATION
ACT OFFICER
U.S. Department of the Interior
Washington, D.C. 20240

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

This confirms the clarification of my enclosed FOIA letter which I have provided to Mr. Ross Mooney. The request concerns water resources issues in the Klamath River Basin in Oregon and California. As I mentioned, Dr. Vandemoer may be the person in Washington with the most knowledge of these issues. Mr. Mooney advised that it would be possible to obtain documents

that originate with her also. I wish to do so. I will also send a letter separately to her office. Thank you.

Cordially yours,

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS
Attorney

PSS/jlp

Enclosures

cc: David Zepponi
Ross Mooney

DE CUIR & SOMACH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
400 CAPITOL MALL
SUITE 1900
SACRAMENTO, CA 95814-4407
TELEPHONE (916) 446-7979
FACSIMILE (916) 446-8199

July 3, 1996

Director, Office of Administration
Bureau of Indian Affairs
ATTN: FREEDOM OF INFORMATION
ACT REQUEST
U.S. Department of the Interior
Washington, D.C. 20240

Dear Freedom of Information Act Officer:

This is a Freedom of Information Act request.

As used in this request, the term "Klamath Basin Tribes" means each of the Klamath Tribes, the Hoopa Tribe, the Karuk Tribe, the Yurok Tribe, and their members, officers, agents, attorneys, consultants, employees, and any other person communicating on behalf of the listed Indian tribes. This request concerns water resources on the Klamath River basin in Oregon and California.

Please provide me with any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes during the period January 1, 1996 through January 14,

1996, and the period March 1, 1996 through July 3, 1996. This includes, but is not limited to, any letter, memorandum, facsimile transmission, meeting notes or notes of telephone conversation or any other conversation, meeting attendance lists, telephone logs, or any document of any kind, regardless of authorship, provided to or received from the Klamath Basin Tribes, or any other document that is evidence of a communication with the Klamath Basin Tribes. This includes copies of communications from the Klamath Basin Tribes to persons or agencies other than your office.

It is not necessary to produce any of the following:

1. March 5, 1996 Letter from Susie Long, Yurok Tribe, to Interested Parties;

2. March 6, 1996 Letter from Richard Cross to Bruce Babbitt, Roger Patterson, Eluid Martinez, and Michael Ryan;

3. March 4, 1996 Report Prepared by Balance Hydrologics, Inc. Regarding Initial Assessment of Pre- and Post-Klamath Project Hydrology on the Klamath River and Impacts of the Project on Instream Flows and Fishery Habitat; and

4. March 1, 1996 Report Prepared by Trihey & Associates, Inc. Regarding Instream Flow Requirements for Tribal Trust Species in the Klamath River.

Please notify me within ten days whether you will comply with this request. If any document or record is

not provided, please describe the document and FOIA exemption that you believe is applicable.

This request is on behalf of the Klamath Water Users Association. The Klamath Water Users Association is a tax-exempt corporation organized under section 501(c)(5) of the Internal Revenue Code and should thus be exempt from fees. If you determine that the request is not exempt from fees, then the fee category of "other requests" in 43 C.F.R. section 2.20(e) applies, and the fee schedule should be determined accordingly. Please advise me in advance if the cost of complying with this request would exceed $50.

Cordially yours,

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS
Attorney

PSS/jlp

cc: David Zepponi

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 96-3077-CO

KLAMATH WATERS USERS PROTECTIVE ASSOCIATION, PLAINTIFF

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR; THE UNITED STATES BUREAU OF INDIAN AFFAIRS, DEFENDANTS

DECLARATION OF SCOTT BERGSTROM

I, Scott Bergstrom, state:

1. I am an Attorney-Advisor within the Office of the Solicitor, Division of Indian Affairs, Department of the Interior ("Department"), Washington, D.C.

2. In such capacity, I am one of the attorneys advising the Department in its development of a long-term operations plan for the Klamath Project. I specifically address issues relating to the interests and responsibilities of the Bureau of Indian Affairs and the Department's fulfillment of its trust responsibility to Indian tribes affected by operation of the Klamath Project. As a consequence of this role, I am also involved in the claim being prepared by the Bureau of Indian Affairs to be filed by the United States, as trustee, on behalf of the Klamath Tribes ("Tribes") in the on-going Klamath

Basin general stream adjudication ("adjudication") in Oregon.

3. All information herein is based upon my personal knowledge and upon information furnished to me in my official capacity.

4. I have also provided legal advice to the Bureau of Indian Affairs and the Office of the Assistant Secretary-Indian Affairs (collectively, "BIA") concerning the Freedom of Information Act ("FOIA") requests submitted to the BIA by the Klamath Water Users Protective Association ("Association").

5. The case at hand, in part, requests the disclosure under the FOIA of documents submitted to the Department by representatives of the Klamath Tribes. These documents discuss issues relating to the Department's trust responsibility to the Tribes in light of the development of a long-term operations plan for the Klamath Project and/or the presently on-going adjudication. The United States is a party to the adjudication, and it will file claims, as trustee, on behalf of the Tribes as well as for other federal interests. The development and adoption of a long-term operations plan for the Klamath Project must be consistent with the Department's trust responsibility to the Tribes in the adjudication. The creation and implementation of a long-term operations plan could result in the Department's facing legal challenges.

6. The United States and the Department have a trust responsibility to protect the rights and resources of the Indian tribes. The Supreme Court recognized this responsibility as early as 1831 in *Cherokee Nation*

v. Georgia, 30 U.S. (5 Pet.) 1 (1831). It has long been the policy and practice of the Department to consult with tribes when those rights and resources are impacted by federal actions. This policy was recently reiterated and confirmed by Order of the Secretary of the Interior on November 8, 1993. A copy of this order is included as Exhibit A to this declaration. Further, the President, by memorandum dated April 29, 1994, directed that each federal agency consult with tribal governments prior to taking actions affecting Federally recognized tribal governments. A copy of this memorandum is included as Exhibit B to this declaration. The concepts of these executive memoranda have been incorporated into the Departmental Manual, and the Secretarial Order has subsequently expired of its own terms. A copy of the pertinent pages from the Departmental Manual is included as Exhibit C to this declaration. These concepts formed the basis of the Memorandum of Agreement for the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan, signed by representatives of the Klamath Basin Tribes and the Department's agencies involved in operations plan development, including the BIA. A copy of this Memorandum of Agreement is included as Exhibit D to this declaration.

7. In connection with the development of water rights claims to be filed by the United States, as trustee, on behalf of the Tribes as well as the development of a long-term operations plan for the Klamath Project, the Department entered into on-going consultations, pursuant to the memoranda discussed in paragraph 6, with the Tribes to ensure that the Department would be fully informed of the Tribes' views and would have the Tribes' analysis available for its

decisionmaking. This consultation involved the discussion of legal analyses and theories regarding the scope of the water rights claims to be filed in the adjudication and the manner in which the Department's trust responsibility affects the operations of the Klamath Project. This consultation included the Tribes' analysis as to the legal theories which the Department may advance or encounter in support of the Tribes' interests in the adjudication, their analysis as to the Department's trust relationship with regard to operation of the Klamath Project, and their analysis regarding the interrelationship between the development of a long-term operations plan and the adjudication. Consultation continues as the Department seeks to fulfill its trust responsibility to represent adequately the Tribes' interest in the adjudication and the development of a long-term operations plan.

8. The United States and the Department have a common interest in protecting tribal rights and resources through the ongoing adjudication and the development of a long-term operations plan which is furthered by this consultation process.

9. Documents identified as FOIA document no. 3/96-168, dated January 19, 1996; FOIA document no. 17/96-168, dated February 16, 1996; FOIA document no. 18/96-168, also dated February 16, 1996; and FOIA document no. 19/96-168, dated February 23, 1996,[1] specifically involve and contain the Tribes' analysis as to matters relating to the adjudication and/or the development of a long-term operations plan. The documents

[1] More specific information about these documents is provided in the Vaughn index.

were prepared by the Tribes as a consequence of consultations with the Department seeking the Tribes' analysis for use by the Department in the performance of its official duties, *i.e.*, in Departmental deliberations concerning adjudication issues as well as its trust responsibility in developing a long-term operations plan. Receipt of these documents will assist the Department in its deliberations and ultimately in the decisionmaking regarding positions to take in the ongoing adjudication and the development of a long-term operations plan. The documents were produced by the Tribes and received by the Department prior to the Department's filing of water rights claims on behalf of the Tribes in the adjudication and prior to the development of a long-term operations plan for the Klamath Project.

10. The Department has used the above-described documents in its case preparation in connection with the adjudication and in addressing its trust responsibility in its development of a long-term operations plan for the Klamath Project.

11. The document identified as FOIA document no. 3/96-168 constitutes the response of Carl Ullman, an attorney for the Tribes, to a Solicitor's Office request for legal analysis discussing issues the Department may address in the adjudication and in operations plan development. This document was submitted to the Department prior to the Department's filing of claims on behalf of the Tribes in the adjudication, which are due to be filed April 30, 1997, and prior to the development of a long-term operations plan for the Klamath Project, currently scheduled to be completed in 1999.

12. The document identified as FOIA document no. 17/96-168 constitutes the response of Carl Ullman, an attorney for the Tribes, to a Solicitor's Office request for legal analysis addressing the issues related both to the adjudication and the development of a long-term operations plan. This document was submitted to the Department prior to the Department's filing of claims on behalf of the Tribes in the adjudication, which are due to be filed April 30, 1997, and prior to the development of a long-term operations plan for the Klamath Project, currently scheduled to be completed in 1999.

13. The document identified as FOIA document no. 18/96-168 is identical to FOIA document no. 17/96-168. This document was submitted to the Department prior to the Department's filing of claims on behalf of the Tribes in the adjudication, which are due to be filed April 30, 1997, and prior to the development of a long-term operations plan for the Klamath Project, currently scheduled to be completed in 1999.

14. The document identified as FOIA document no. 19/96-168 constitutes the response of Carl Ullman, an attorney for the Tribes, to a Solicitor's Office request for legal analysis addressing the issues related both to the adjudication and the development of a long-term operations plan. Although this document is signed by Elwood Miller, Jr., Director of the Klamath Tribes' Department of Natural Resources, I understand that Mr. Ullman is the author. This document was submitted to the Department prior to the Department's filing of claims on behalf of the Tribes in the adjudication, which are due to be filed April 30, 1997, and prior to the development of a long-term operations plan for the Klamath Project, currently scheduled to be completed in 1999.

15. Documents identified as FOIA document no. 3/96-168, FOIA document no. 17/96-168, FOIA document no. 18/96-168, and FOIA document no. 19/96-168 were prepared by tribal attorney Carl Ullman as part of the consultation process between the Department and the Tribes and in response to the Department's request for the Tribes' analysis. These documents were prepared to assist the Department in the development of water rights claims to be filed on behalf of the Tribes in the adjudication as well as the development of a long-term operations plan for the Klamath Project. They were created for use by Departmental attorneys and staff in the performance of their official duties, *i.e.*, in the deliberations and preparations of the Department's and/or the United States' position in current and potential future litigation as well as for the continuing development of a long-term operations plan for the Klamath Project.

In accordance with 28 U.S.C. § 1746 I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 5, 1997

/s/ SCOTT BERGSTROM
SCOTT BERGSTROM
Attorney-Advisor
Office of the Solicitor

INDEX

Klamath Water Users Protective Assocation v. United States Department of the Interior; United States Bureau of Indian Affairs, Civil Action No. 96-3077-CO

Following is a detailed description of each withheld document and accompanying justification for asserting FOIA exemption (5).

* * * * *

b. Correspondence Between Interior Personnel and Klamath Basin Tribes Representatives or Organizations

1. FOIA document number: 3/96-168
   Type of document: Position Paper
   Subject: Untitled—discusses water law
   To: Sent to Cathy Wilson (BIA); also sent to Office of the Solicitor, Division of Indian Affairs
   From: Klamath Tribes Department of Natural Resources
   Date: January 19, 1996
   Description: Seven page position discussing legal theories concerning the water rights of the federally recognized Indian tribes of Klamath Basis [sic]
   Exemption(s) claimed: (b)(5)
   Basis for withholding: Attorney work-product and deliberative process privileges. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a) the Department consults with the Klamath Tribes when Departmental actions may affect tribal resources pursuant to the

Department's trust obligation and (b) the Department has relied upon the document in its deliberations. The Office of the Solicitor asked Bud Ullman, an attorney for the Klamath Tribes, to develop this position paper. This document is attorney work product because it is prepared by an attorney and has been shared with the Department because of the common interest in protecting tribal trust resources in the development of an operations plan for the Klamath Project, in potential litigation arising from the operations plan development, and in the pending adjudication in Oregon. This document is predecisional because it predates both (a) the filing of the water rights claims on behalf of the Klamath Tribes in the Klamath Basin Adjudication, which are due to be filed April 30, 1997, and (b) the issuance of an operations plan for the Klamath Project. This document is also deliberative in nature because it actually addresses issues related to the development of an operations plan for the Klamath Project and the pending adjudication. Disclosure of the document would expose the Department's decision-making process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to address water rights issues concerning the tribes.

2. FOIA document number: 6/96-168
   Type of document: Memorandum
   Subject: Department of Interior Responsibility to the Trust Asset (Fish in the Upper and Lower Klamath Basin)
   To: Tom Strekal (BIA), Doug Tedrick (BIA), Richard Cross (attorney for Yurok Tribe), and Bud Ullman (attorney for Klamath Tribes)

From: Cathy Wilson (BIA)
Date: January 24, 1996
Description: One page memorandum. The memorandum contains views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project. Specifically, the memorandum considers proposing language as guidance regarding the trust responsibility.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra-agency" threshold requirement for invoking exemption (5) because (a) the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. The recipients of this memorandum were BIA Klamath team members and tribal attorneys who worked on this project under the terms of the Government-to-Government Memorandum of Agreement. *See* Memorandum of Agreement for Government-to-Government Relationship in the Development of the Klamath Projects Operations Plan, November 1995. This memorandum is predecisional because it predates the issuance of an operations plan. This memorandum is also deliberative in nature [*sic*] because it actually addresses issues related to the development of an operations plan for the Klamath Project. Disclosure of the memorandum would expose the Department's decisionmaking process in such a way as to discourage candid discussion within

the Department and thereby undermine the Department's ability to develop an operations plan.

* * * * *

4. FOIA document number: 10/96-168
Type of document: Position Paper
Subject: Comments on USFWS Proposals for Listed Species
To: Tom Strekal (BIA)
From: Bud Ullman (attorney for Klamath Tribe)
Date: February 8, 1996
Description: Five page position paper with facsimile transmittal sheet. On December 3, 1996, the Department released the facsimile transmittal sheet accompanying this document. The paper expresses views concerning trust resources in light of the Fish and Wildlife Service's proposal regarding listed species and the resulting implications on lake management.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra- agency" threshold requirement for invoking exemption (5) because (a) the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. This document is predecisional because it predates the issuance of an operations plan. This document is also deliberative in nature because it actually addresses issues related to the development of an operations plan for the Klamath Project. Disclosure of the document would expose the Department's

decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to develop an operations plan.

* * * * *

13. FOIA document number: 16/96-201
Type of document: Letter
Subject: Klamath Tribes's water rights in the Klamath Basin Adjudication
To: Lynn Peterson (Regional Solicitor)
From: Bud Ullman (attorney for Klamath Tribes)
Date: May 23, 1996
Description: Three page letter discussing the Klamath Basin Adjudication. This letter concerns the water rights claims being prepared on behalf of the Klamath Tribes.
Exemption(s) claimed: (b)(5)
Basis for withholding: Attorney work product and deliberative process privileges. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a) the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. The Office of the Solicitor asked Bud Ullman, an attorney for the Klamath Tribes, to develop this letter. This document is attorney work product because it is prepared by an attorney and has been shared with the Department because of the common interest in protecting tribal trust resources in the pending adjudication in Oregon. This document is predecisional because it predates the filing

of the water rights claims on behalf of the Klamath Tribes in the Klamath Basin Adjudication, which are due to be filed April 30, 1997. This document is also deliberative in nature because it actually addresses issues related to the pending adjudication which involves tribal water rights to be filed. Disclosure of the document would expose the Department's decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to address water rights issues concerning the tribes. Disclosure would expose sensitive litigation positions to be taken in the adjudication.

* * * * *

16. FOIA document number: 20/96-201
Type of document: Letter
Subject: Klamath Tribes's water rights
To: Stan Speaks (BIA)
From: Jeff Mitchell (Klamath Tribes)
Date: June 18, 1996
Description: One page letter with attachment. Letter references the attachment and highlights the issues therein. Attachment is the three page 5/23/96 letter from Bud Ullman (attorney for Klamath Tribes) to Lynn Peterson (Regional Solicitor) discussing the Klamath Basin Adjudication (identified by FOIA document number 16/96-201). See analysis above regarding the rationale for withholding the attachment.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a)

the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. This document is predecisional because it predates the filing of claims on behalf of the Klamath Tribe in the pending Oregon adjudication. This document is also deliberative in nature because it actually addresses issues related to the water rights claims to be filed in the adjudication. Disclosure of the document would expose the Department's decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to address the water rights of the tribes. Disclosure would expose sensitive litigation positions to be taken in the adjudication.

17. FOIA document number: 25/96-201
Type of document: Letter
Subject: Klamath Tribal Executive Committee Resolution
To: Stan Speaks (BIA)
From: Bud Ullman (attorney for Klamath Tribes)
Date: June 28, 1996
Description: One page letter with two page attachment. Letter references the attachment and highlights the issues therein. Attachment is the Klamath Tribes's resolution regarding the Tribes's water rights claims in the Klamath Basin Adjudication.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a) the Department consults with the Klamath Basin

Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. This document is predecisional because it predates the filing of claims on behalf of the Klamath Tribe in the pending Oregon adjudication. This document is also deliberative in nature because it actually addresses issues related to the water rights claims to be filed in the adjudication. Disclosure of the document would expose the Department's decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to address the water rights of the tribes. Disclosure would expose sensitive litigation positions to be taken in the adjudication.

* * * * *

19. FOIA document number: 27/96-201
Type of document: Internal memorandum
Subject: Untitled—discusses endangered suckers
To: Cathy Wilson (BIA)
From: Jacob Kahn (Klamath Tribes)
Date: July 1, 1996
Description: Two page memorandum, nine pages of graphs, and a facsimile transmittal sheet. The memorandum concerns biological factors affecting trust resources. On December 27, 1996, the Department released the facsimile transmittal sheet accompanying this document.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a)

the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. This document is predecisional because it predates the issuance of an operations plan. This document is also deliberative in nature because it actually addresses issues related to the development of an operations plan for the Klamath Project. Disclosure of the document would expose the Department's decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to develop an operations plan. Disclosure would expose technical opinions deemed critical to analyzing the extent of the Department's trust responsibility.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release April 29, 1994

April 29, 1994

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Government-to-Government Relations with Native American Tribal Governments

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native

American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.

(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

(c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(d) Each executive department and agency shall take appropriate steps to receive any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Order Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

WILLIAM J. CLINTON

[seal omitted]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

ORDER NO. 3175

Subject: Departmental Responsibilities for Indian Trust Resources

Sec. 1 Purpose. This Order clarifies the responsibility of the component bureaus and offices of the Department of the Interior to ensure that the trust resources of federally recognized Indian tribes and their members that may be affected by the activities of these bureaus and offices are identified, conserved and protected. It is the intent of this Order that each bureau and office will operate within a government to government relationship with federally recognized Indian tribes and that the Bureau of Indian Affairs provide timely and accurate information upon the request of their Interior Department counterparts.

This Order is for internal management guidance only, and shall not be construed to grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations.

Sec. 2 Authority. This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262).

Sec. 3 Responsibility. The heads of bureaus and offices are responsible for being aware of the impact of their plans, projects, programs or activities on Indian trust resources. Bureaus and offices when engaged in the planning of any proposed project or action will ensure that any anticipated effects on Indian trust resources are explicitly addressed in the planning, decision and operational documents; i.e., Environmental Assessments, Environmental Impact Statements, Management Plans, etc., that are prepared for the project. These documents should clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Department's trust responsibilities. Bureaus and offices are required to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect, the appropriate office of the Bureau of Indian Affairs, and the Office of the Solicitor (for legal assistance) if their evaluation reveals any impacts on Indian trust resources. All consultations with tribal governments are to be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposal on trust resources.

The heads of the Department's bureaus and offices will prepare and publish procedures and directives prior to the expiration of this Order to ensure that their respective units are fully aware of this Order and that they are in compliance with the intent of the Order. Prior to final issuance, the Office of American Indian Trust will review and comment on these procedures before their approval by the Assistant Secretary—Indian Affairs.

Sec. 4. Effective Date. This Order is effective immediately. Its provisions will remain in effect until October 1, 1994, or until it is amended, superseded, or revoked, whichever occurs first.

/s/ BRUCE BABBITT
Secretary of the Interior

Date: NOV 8, 1993

DEPARTMENT OF THE INTERIOR
DEPARTMENTAL MANUAL

Part 512 American Indian and Alaska Native Programs

Intergovernmental Relations

Chapter 2 Departmental Responsibilities for Indian Trust Resources 512 DM 2.1

2.1 Purpose. This Chapter establishes the policies, responsibilities, and procedures for operating on a government-to-government basis with federally recognized Indian tribes for the identification, conservation, and protection of American Indian and Alaska Native trust resources to ensure the fulfillment of the Federal Indian Trust Responsibility.

2.2 Policy. It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.

2.3 Responsibilities.

A. Heads of bureaus and offices are responsible for identifying any impact of Departmental plans, projects, programs or activities on Indian trust resources. Department officials shall:

(1) Establish procedures to ensure that the activities of Departmental organizations impacting upon Indian trust resources are explicitly addressed in planning, decision, and operational documents;

(2) Ensure that bureaus and offices consult with the recognized tribal government whose trust resource, asset, or health and safety is potentially affected by the proposed action, plan, or activity;

(3) Remove procedural impediments to working directly and effectively with tribal governments;

(4) Provide drafts of all procedures or amendments to procedures developed pursuant to this Chapter to the Office of American Indian Trust for review and comment; and,

(5) Designate a senior staff member to serve as liaison between the bureau or office and the Office of American Indian Trust.

B. Office of American Indian Trust is responsible for ensuring compliance with the procedures and requirements under this Chapter. The Office of American Indian Trust will serve as the Department's liaison and initial point of contact on all matters arising under this Chapter. All procedures and amendments to procedures shall be submitted by Departmental bureaus and offices to the Office of American Indian Trust for review and comment. After such review and comment, the procedures and amendments to procedures will be transmitted to the Assistant Secretary - Indian Affairs for final approval.

C. Assistant Secretary - Indian Affairs is responsible for approving bureau and office procedures, or amendments thereto, developed pursuant to this Chapter.

2.4 Procedures.

A. Reports. As part of the planning process, each bureau and office must identify any potential effects on Indian trust resources. Any effect must be explicitly addressed in the planning/decision documents, including, but not limited to, Environmental Assessments, Environmental Impact Statements, and/or Management plans prepared for the project or activity. The documentation shall:

(1) Clearly state the rationale for the recommended decision; and

(2) Explain how the decision will be consistent with the Department's trust responsibility.

B. Consultation. In the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s), the appropriate office(s) of the Bureau of Indian Affairs, the Office of the Solicitor, and the Office of American Indian Trust. Each bureau and office within the Department shall be open and candid with tribal government(s) during consultations so that the affected tribe(s) may fully evaluate the potential impact of the proposal on trust resources and the affected bureau(s) or office(s), as trustee, may fully incorporate tribal views in its decision-making processes. These consultations, whether initiated by the tribe or the

Department, shall be respectful of tribal sovereignty. Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).

MEMORANDUM OF AGREEMENT FOR THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP IN THE DEVELOPMENT OF THE KLAMATH PROJECT OPERATIONS PLAN

This memorandum of Agreement (Agreement) provides a guide for the implementation of the government-to-government relationship between the United States, acting through the Bureau of Reclamation (Reclamation), in coordination with the Fish and Wildlife Service, National Marine Fisheries Service, and the Bureau of Indian Affairs (these four will hereinafter be referred to, separately and together, as the United States), and the Klamath, Yurok, Hoopa, and Karuk Tribes (Klamath Basin Tribes or Tribes), with respect to the development of the long-term operations plan, the Klamath Project Operations Plan (KPOP), for Reclamation's Klamath Project. Several meetings have been conducted between the Tribes and the United Sates with regard to the KPOP. These meetings have served to clarify the proposed structure of the government-to-government relationship.

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. The elements of this unique relationship include: (a) recognition of the rights of tribes as sovereign entities; (b) recognition of the right of tribes to delegate representation; (c) consultation with tribal governments prior to taking actions that affect tribal governments, rights, or trust resources; and (d) participation by tribes in planning and managing the trust resource base. Recent expressions of the relationship between the United States

Government and Native American tribal governments are found in President Clinton's Memorandum of April 29, 1994, and Order No. 3175 of the Secretary of the Interior issued November 8, 1993. These documents are attached as Exhibit A and B, respectively.

(A) Tribes as Sovereigns

The President's Memorandum and the Secretarial Order recognize the sovereign nature of tribal governments and are intended to ensure that the rights of sovereign tribal governments are fully respected.

A memorandum prepared by the Regional Solicitor, Pacific Southwest Region, of the Department of the Interior, dated July 25, 1995, provides the legal framework developed by the Regional Solicitor for the guidance of the United States regarding the Tribal water rights, among others, that may be affected by development of the KPOP and Project operations. The Regional Solicitor's memorandum describes certain rights of the Tribes, including water and fishing rights recognized by treaty, statute, executive order and case law, and sets out the relative priority of the Tribes' water rights. The Regional Solicitor's memorandum is attached as Exhibit C.

With respect to the development of the KPOP, the government-to-government relationship involves the following:

1. Identification of Tribal water rights and hunting, fishing and gathering rights that may be affected by Project operations.

2. Assessment, in consultation with the Tribes, of the impacts of the KPOP on Tribal trust resources and species of concern under the Endangered Species Act, and assurance that Tribal governments' rights and concerns are considered during the development of the KPOP.

3. Direct and effective communications with the Tribal governments and their authorized representatives in developing and completing the KPOP.

(B) Tribal Delegation of Authority

The Tribes have delegated certain responsibilities to the Klamath River Inter-Tribal Fish and Water commission (the "KRITFWC"), which is an inter-tribal resources management entity comprised of representatives of each of the Tribes. The United States will communicate and coordinate with the KRITFWC and the Tribes. Communications will be directed to those listed on Attachment D.

(C) Consultation

Consistent with the responsibilities of Federal agencies to respect the government-to-government relationship with tribal governments, in developing the KPOP, the United States will consult with the Klamath Basin Tribes prior to taking actions that affect these Tribal governments, and will consider the comments and concerns of the Tribes in a timely and meaningful way, before decisions are made.

A consultant has been hired to conduct the bulk of the technical work related to developing the KPOP. The consultant will communicate with the Tribes and their representatives, seek data and other information

from the Tribes, and include the comments and programs of the Tribes in its analysis related to the KPOP. The United States will consider the data and information submitted by the Tribes and will either incorporate the data and information, or provide reasons for not doing so.

Consultation with respect to the development of the KPOP will take the following form:

1. The United States, together with the consultant, will meet with the Tribes and provide copies of working documents for tribal review and comment to further the government-to-government relationship.

2. The United States will communicate on a monthly or more frequent basis with the designated representative(s) of each Tribe. Written communications and reports shall be sent to the representatives of the Tribes and the United States, as identified in Attachment O.

(D) Tribal Management and Participation in the KPOP Process

Water resources management involves extensive decision making. Building Tribal participation into agency planning and decision making is a necessary, foundational component of the government-to-government relationship and future decision making, as it is essential to incorporate the perspective that only the Tribes can provide regarding the impact of management decisions on Tribes and their resources.

The KPOP is being developed and will be adopted by Reclamation as a means of managing water resources

within its authority related to the Klamath Project. The Tribes have responsibility for the management of trust resources within their authority. Tribal involvement in the development of the KPOP is an important component of the government-to-government relationship. This involvement of the Tribes is a major means of assuring that the development of the KPOP reflects the United States' trust obligation and Tribal rights.

With respect to the KPOP, Tribal involvement will include the following:

1. Reclamation and the Tribes will, to the maximum extent practicable, coordinate their resource management activities as they affect one another.

2. Tribal involvement will include but not be limited to conducting scientific research and data collection regarding stream flows, like [sic] levels, water quality, fish populations, water needs and supply forecasts, and evaluating the assessing overall river and lake operations.

3. The Tribes will provide data and input to Reclamation in a timely fashion for development of the KPOP.

4. The Tribes will be involved in the technical evaluation of the data used, collected and analyzed, and technical conclusions drawn from such data.

5. The Tribes will participate with the United States regarding management decisions and actions implementing the KPOP that affect Tribal trust resources. The United States will seek Tribal involvement at the

earliest time to assure an opportunity for the Tribes to provide input regarding data collection, analysis and management decisions. In developing and implementing the KPOP, Reclamation, consistent with its trust responsibility, will protect Tribal rights, including the Tribes' water rights and rights to other trust resources.

(E) Effect of Agreement

This agreement is to provide for the effective implementation of the government-to-government relationship between the parties, and is in furtherance of the responsibility of the United States to protect Tribal trust resources. It does not by itself create, change, or alter any rights of any of the parties to the Agreement, nor by itself does it create an independent right subject to judicial review. Nothing in this Agreement is intended to or shall have the effect of constraining or limiting the United States in carrying out its obligations under law, including its trust obligations. All communications under this Agreement are in furtherance of federal responsibilities.

Nothing in this Agreement is intended to or shall apply to the relations of the parties in connection with the Klamath Basin Water Rights Adjudication pending before the State of Oregon.

This Agreement may be modified or amended upon the mutual consent of the parties.

This Agreement may be executed in counterparts.

Bureau of Reclamation
By: /s/ [illegible] Patterson
Title: Regional Director
Mid-Pacific Region
Date: 11/17/95

Klamath Tribe
By: /s/ [signature illegible]
Title: _____
Date: 11/15/95

Fish and Wildlife Service
By: /s/ [signature illegible]
Title: Reg. Dir.
Date: 11/20/95

Hoopa Valley Tribe
By: /s/ Fred [illegible]
Title: Vice Chair
Date: 11/15/95

Bureau of Indian Affairs
Sacramento Area Office
By: /s/ [signature illegible]
Title: Area Director
Date: 11/16/95

Karuk Tribe

By: /s/ Barry "Skip" [illegible]
Title: Vice-Chairman
Date: 11/15/95

Bureau of Indian Affairs
Portland Area Office
By: /s/ Edmond G. Payne
Title: Acting Area Dir.
Date: 11/21/95

Yurok Tribe

By: /s/ Maria Jupp
Title: Vice-Chair
Date: 11/15/95

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF INDIAN AFFAIRS, DEFENDANTS

DECLARATION OF DAVID A. SOLEM

I, David A. Solem, declare:

1. I am the Manager of the Klamath Irrigation District (KID). I have held this position since 1983. KID is a party to a contract with the United States Bureau of Reclamation (Reclamation) providing for delivery of irrigation water through facilities constructed as part of the Klamath Project. I am also KID's representative on the Board of Directors of the Klamath Water Users Association (Association). I am also the President of the Association. I have held this position for four months. Prior to being elected the President of the Association, I was its Vice President for a approximately five years.

2. The Association is non-profit corporation formed under section 501(c)(5) of the Internal Revenue Code.

Most of the members of the Association are contractors of Reclamation and receive water for irrigation through Klamath Project facilities. Of these, most are public agencies, primarily irrigation districts.

The current members of the Association distribute water to nearly 230,000 acres of land for irrigation in southern Klamath County, Oregon, and northern Modoc and Siskiyou Counties in California. With few exceptions, this land is irrigated and farmed by private individuals or firms. The total value of agricultural products produced by the Klamath Project has been estimated at $120 million annually. In addition to the families directly supported by agriculture, numerous businesses provide goods and services to farmers. Agriculture supports a significant portion of the local tax base.

3. I have personal knowledge of the operations of the Klamath Project since 1982. The major source of water for irrigation in the Klamath Project area is Upper Klamath Lake. Water is both stored in the lake by operation of a dam, and also diverted from the lake through a large canal (A Canal) operated by KID. In addition, some water released from the dam is diverted for project irrigation at locations just below the dam. Other water released from the dam flows into the Klamath River and eventually to California and into the Pacific Ocean.

In the past few years, Reclamation and Interior have stated that water in the Klamath Project must be managed, allocated, or reallocated to protect interests of various Indian tribes. I do not recall the Interior agencies taking this position or taking any action in this regard prior to about 1992. Since 1994, the tribes' is-

sues have become more prominent. In the late summer of 1994, a drought year, Reclamation personnel advised me that additional water would be released from Link River Dam to provide Klamath River flows at the demand of the tribes downstream. On behalf of KID, I objected to this proposed action. However, the additional water was released, resulting in shortages and injury for some irrigators.

4. In February of 1995, Reclamation announced that it planned to prepare a plan for long-term operation of the Klamath Project. The purpose of the plan was to be to develop a plan to operate the Klamath Project according to the various legal obligations of Interior, and in different types of years (for example, "wet" or "dry"). Reclamation stated that this Klamath Project Operation Plan (KPOP) would be completed by March of 1996, in time to guide project operations for 1996 and subsequent years. In the meantime, Reclamation prepared a one-year operating plan for 1995, after circulating a draft for public comment.

5. In general, the process for developing the KPOP included obtaining input from all interested parties. The approach was to be that the legal obligations of Reclamation would first be clearly defined. Then, technical issues such as the water "needs" of agriculture or biological resources would be analyzed. The alternatives for operating the project in light of the legal and technical issues would then be studied, leading to a decision.

6. The Interior agencies created a series of meetings to discuss KPOP development, to which all interested parties were invited. I attended nearly all of these meeting [*sic*].

7. Interior hired a consultant, CH2M Hill, to assist in KPOP development. CH2M Hill prepared a number of technical papers based on its analysis. All interested parties were given an opportunity to comment on the draft technical memos. Reclamation also engaged the U.S. Geological Survey to review technical information and arguments that had been submitted by various parties, primarily those of the Klamath Tribe and its consultants.

8. Reclamation and other Interior personnel from all participating agencies repeatedly assured me that the KPOP development would be an open, public process in which no interest would receive special or preferred treatment.

9. Numerous Interior agency personnel attended the KPOP meetings, including employees of Reclamation, the U.S. Fish and Wildlife Service, and the Bureau of Indian Affairs. Frequently, meetings were attended even by representatives of the Office of the Secretary. Tribal representatives and their attorneys and consultants also attended. The meetings were also attended by representatives of environmental groups and state agencies. At the meetings, tribes and environmental groups advocated decisions for management of water that would reallocate water used in the Klamath Project to instream uses. The Yurok, Hoopa, and Karuk Tribes advocated high flows in the mainstem of the Klamath River. The Klamath Tribe advocated maintaining high lake elevations in Upper Klamath Lake. Many of these proposals would have been very detrimental to irrigation interests.

Usually, on the occasion of KPOP meetings, some Interior representatives would also meet separately

with Klamath Project irrigation interests. I attended these meetings. I was aware that the Interior representatives also would have separate meetings with the tribes, which were called "government to government" meetings.

Many irrigation representatives were frustrated and angered by the KPOP process. I have heard many people express this frustration to Interior personnel. I and others believed that Interior had not answered several basic questions about its legal authority to proceed in the manner it was proceeding. I and others also expressed concern that the KPOP meetings had become primarily a forum for advocacy of reallocating water away from the Klamath Project. Nonetheless, we agreed to participate in the process through its completion.

10. Throughout the KPOP process, we were informed that the Klamath Project Manager, Mike Ryan, a Reclamation employee, had ultimate authority as to the contents of the final KPOP. We were informed that the other Interior agencies would review and comment on a proposed plan prepared by Mr. Ryan before a draft was released to the public, but that ultimately the plan would be Mr. Ryan's plan. The deadline for issuing a final plan was March 15, 1996, and a draft plan would be issued for public comment by mid-February of 1996. We were advised that Mr. Ryan would prepare a plan for internal review in Interior and then a public draft would be released. We were told that neither irrigators, tribes, nor other persons outside of the federal government would have an opportunity to review the plan before a draft plan was released publicly.

11. I discussed the status of the KPOP with Mr. Ryan during February of 1996. At one point, Mr. Ryan informed me that, with the assistance of CH2M Hill, he completed a draft plan for internal review by Interior personnel. He also told me that the plan was circulated within Interior for review. He also told me that, after receiving comments from within Interior, he completed a plan for release for public review. There was no draft KPOP released to the public in 1996 or at any other time.

12. I was concerned that the draft plan had been shared with tribes despite the representations of Interior that this would not occur, and that objections of the tribes had led to the "vetoing" of the plan. I specifically asked Mr. Ryan if the draft plan he had prepared had been reviewed by the tribes in the Klamath Basin. He assured me that it did not. I also heard other persons question Interior personnel regarding whether the internal plan had been provided to the tribes. On each occasion, the Interior personnel stated that it had not. The persons who made this statement included Roger K. Patterson, Regional Director, Mid-Pacific Region, U.S. Bureau of Reclamation; Les Ramirez, Special Assistant to the Secretary, Office of the Secretary of the Interior; and David Cottingham, Department of the Interior.

13. Since the decision by Reclamation or Interior not to release a plan in 1996, water allocation issues have remained very contentious. Reclamation employees have generally stated that they now hope to prepare a long-term plan by sometime in 1999. No specific schedule or completion date has been identified. I am aware of no written schedule for this work. Reclama-

tion personnel, including Mr. Patterson, have expressed skepticism in my presence as to when a long-term plan might actually be completed. A one-year plan called an advisory was released in 1996. There is no plan of any kind for 1997.

14. I am familiar with reports prepared for the Yurok Tribe or its attorneys by the consulting firms of Balance Hydrologics and Trihey and Associates. I was present at a KPOP meeting in February or March of 1996 when an attorney for the Yurok Tribe stated that if Reclamation did not adopt the recommendations of the report, the attorney would have a court impose those requirements, or words to that effect.

15. In all, the Association has about 20 irrigation districts, improvement districts and other public agency members. Membership in the Association is voluntary. Each year, each member determines whether it will pay an assessment to the Association and participate in its activities. The Association has no other source of revenue, other than occasional donations or revenues from fundraising events. The Association currently has one employee, whose functions are primarily administrative. The Association formally employed an executive director.

The Association does not conduct any commercial activities. The Association does not use or distribute water from the Klamath Project or have a contract to receive water through Klamath Project facilities.

16. Some of the Association members are not contractors within the Klamath Project.

17. The Association provides information and representation for its members on matters in which they have common interest, and to persons in the Klamath Basin generally. The Association annually holds a meeting at which is presented information regarding the activities of the Association and current developments regarding water resources issues in the Klamath River Basin. The Association maintains a library of materials related to water resources, agriculture, and other resources issues in or affecting the Klamath Basin. The Association also makes information available to the public by participation in public or civic functions such as booths at county fairs.

18. The Association has for several years been active in environmental or ecosystem restoration efforts in the Klamath River Basin. In 1992, the Association prepared and published the *Initial Ecosystem Restoration Plan for the Upper Klamath River Basin.* The Association has also provided support, funding, and implementation services for ecosystem restoration projects in the Klamath Basin, such as fencing of streams and marsh and riparian restoration projects.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 11th day of April 1997 at Klamath Falls, Oregon.

/s/ DAVID A. SOLEM
DAVID A. SOLEM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF INDIAN AFFAIRS, DEFENDANTS

DECLARATION OF PAUL S. SIMMONS

I, Paul S. Simmons, declare:

1. I am an attorney and shareholder in the law firm of De Cuir & Somach. I am admitted to practice law in the States of California and New York and in the U.S. Court of Appeals for the Ninth Circuit. I have been admitted pro hac vice to practice before this Court in this litigation. My firm represents the Klamath Water Users Association (Association).

2. In late January of 1995, I learned that officials from the Department of the Interior (Interior) had scheduled meetings in Berkeley, California with members of certain environmental groups and Indian tribes. I also learned that these meetings were to involve water resources in the Klamath River Basin and the demands of environmental groups and tribes that water

used in the Klamath Project be allocated to instream use. In early February, I sent Freedom of Information Act (FOIA) requests to various Interior agencies, including the Office of the Regional Solicitor, Pacific Southwest Region, requesting information related to those meetings. Exhibit A is a true and correct copy of the response with enclosures received from David Nawi, Office of the Solicitor, Pacific Southwest Region, to Paul Simmons, De Cuir & Somach, dated March 10, 1995, regarding Freedom of Information Act Request.

3. I have observed the Klamath Project Operation Plan (KPOP) process described by David Solem in his declaration. I attended a few of the KPOP meetings, and have spoken on numerous occasions with personnel from all agencies in Interior who are involved in the recently-developed process for developing plans for Klamath Project operations.

4. I have sent numerous requests to Interior agencies under FOIA for communications between such agencies and Klamath Basin tribes and other groups. I have received numerous documents in response. In addition, documents have been provided to my clients and me on verbal request. The following documents received from Interior include the following:

Exhibit B	Memorandum from James K. Bryant, Bureau of Reclamation, to Files, dated September 26, 1994, regarding Meeting with Native American Tribes Concerning the Operation of Upper Klamath Lake and the Klamath River System on September 22, 1994

Exhibit C — Letter from Marvin Garcia, The Klamath Tribe, to Hon. Bruce Babbitt, Secretary of the Interior, dated December 27, 1994, regarding Reinitiation of Formal Consultation Pursuant to Endangered Species Act § 7 and Operation of the Klamath Irrigation Project; 60-Day Notice of Violation and Intent to Sue

Exhibit D — Letter from Joseph C. Polos, Yurok Tribe Fisheries Program, to Mike Ryan, Klamath Project, Bureau of Reclamation, dated January 19, 1995

Exhibit E — Letter from Dennis D. Lynch, Geological Survey, Department of the Interior, to Michael J. Ryan, Bureau of Reclamation, dated January 24, 1995

Exhibit F — Memorandum from Tryg Sletteland, Sierra Club Legal Defense Fund, to Klamath Campaign Clients, dated April 21, 1995, regarding Decision Not to Sue on 1995 Operations Plan

Exhibit G — Letter from Richard A. Cross, Alexander & Karshmer, to Michael J. Ryan, Bureau of Reclamation, dated March 31, 1995, regarding Draft 1995 Klamath Operations Plan

Exhibit H — Letter from Elwood Miller, The Klamath Tribes, to Mike Ryan, Bureau of Reclamation, dated May 5, 1995, regarding Call for Scientific Data

Exhibit I — Letter from Richard A. Cross, Alexander & Karshmer, to Mike Ryan, Bureau of Reclamation, dated October 27, 1995, regarding Additional Comments Regarding Draft Technical Memoranda Re: "Key Facilities" and "Runoff Forecasting"

Exhibit J — Letter from Carl Ullman, Water Adjudication Project The Klamath Tribe, to Gary Baker, Bureau of Reclamation, dated October 27, 1995, regarding KPOP Tech Memo: Klamath Basin Runoff Forecasting

Exhibit K — Letter, with attachments, from Richard A. Cross, Alexander & Karshmer, to Michael Ryan and James Bryant, Bureau of Reclamation, dated February 5, 1996, regarding Freedom of Information Act Request

Exhibit L — Letter, excluding attachments, from Richard A. Cross, Alexander & Karshmer, to Roger Patterson and Michael Ryan, Bureau of Reclamation, dated March 15, 1996, regarding Water Required to Be Made Available by the Klamath Project in Satisfaction of the Upper Klamath Basin Component of the Yurok Klamath River Anadromous Fishery Reserved Water Right and the Trust Responsibility

Exhibit M — Letter, excluding attachments, from Richard A. Cross, Alexander & Karshmer, to Michael Ryan, Bureau of Reclamation, dated March 27, 1996, regarding Klamath Project Operations Plan

Exhibit N — Letter from Elwood Miller, Jr., The Klamath Tribes, to Honorable Bruce Babbitt, Secretary of the Interior, dated September 12, 1996, regarding Bureau of Reclamation Kill of Endangered Species in Upper Klamath Lake; 60-Day Notice of Intent to Sue for Violation of the Endangered Species Act

In responding to requests under FOIA, no bureau or department in Interior has withheld documents based on a claimed deliberative process privilege other than the Bureau of Indian Affairs.

5. Exhibit O is a true and correct copy of certain documents supplied to me by Reclamation in response to a FOIA request dated February 27, 1996.

6. Exhibit P is a true and correct copy of KPOP Working Group Meeting Minutes dated October 30, 1995, supplied to me by Reclamation.

7. Exhibit Q is a true and correct copy of a letter from Stephen E.A. Sanders, Oregon Department of Justice, to Martha Pagel, Director, Oregon Water Resources Department, dated March 18, 1996, regarding Klamath Adjudication and Klamath Project operations.

8. On August 23, 1996, I sent a FOIA request to the Office of the Solicitor of Interior and various Regional Solicitor's offices. The FOIA letters requested copies of any correspondence from tribes or their attorneys relating to the March 18, 1996, letter from the Oregon Attorney General (attached as Exhibit Q). Exhibit R is a true and correct copy of the response of Robert T. Anderson, Associate Solicitor, Office of the Solicitor, dated November 15, 1996, with one of its enclosures.

After Interior decided in early 1996 not to release a draft KPOP for public review, it announced that it would pursue a different process for developing a long-term operations plan. In particular, Interior stated that it would prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act, in conjunction with the long-term plan. In a discussion with Mr. Kirk Rodgers, Assistant Regional Director, Mid-Pacific Region, Bureau of Reclamation, I learned that three Klamath Basin tribes had proposed to serve as contractors to prepare portions of the EIS. I made known to Mr. Rodgers my concern that irrigation interests do not believe the tribes are disinterested or unbiased as a contractor in such a role should be. I also expressed my concern in a letter to Reclamation dated September 6, 1996, a copy of which is attached as Exhibit S.

After these letters were sent, I received a telephone call from Mr. Karl Wirkus, the current Project Manager of the Klamath Project. I reiterated my concerns to Mr. Wirkus. I also pointed out to him that BIA had refused to provide me with communication between the tribes and Interior, that the tribes are interested parties, and that it, in my opinion, was very inappropriate

under these circumstances for tribes to be retained as consultants.

Mr. Wirkus specifically informed me that if the tribes ever were retained as consultants in Klamath Project planning as the tribes proposed, all communications between them would be open and available to all interested persons.

9. The Association does not intend to participate in the Klamath River adjudication being conducted by the State of Oregon. However, my firm represents the Tulelake Irrigation District, which is a member of the Association, in the adjudication.

10. Interior personnel, including Mr. Steve Palmer from the Regional Solicitor's Office, have advised me that Interior will, in the Klamath River adjudication, file claims to the effect that the Klamath Tribe has water rights in the Klamath River system, but that also the tribe will file a claim or claims on its own behalf. Interior personnel have informed me that Interior will not file claims on behalf of the Yurok Tribe, the Hoopa Tribe, or the Karuk Tribe.

Mr. Palmer has advised me that he is the attorney with primary responsibility for preparing and defining Reclamation's claim of irrigation rights for the Klamath Project.

Department of the Interior (Interior) personnel, including Mr. Palmer, has informed me that Interior will also file claims in the adjudication to assert and protect the irrigation water rights in the Klamath Project.

I have discussed the adjudication on several occasions with Mr. Palmer and other Interior personnel. I have asked Mr. Palmer whether, if irrigation interests submit information or theories related to the adjudication to Interior agencies or the Solicitor's Office, those materials would be made available to tribes or other parties requesting them under FOIA. Mr. Palmer stated that he believed such materials would be made available to those parties on request.

11. Exhibit T is a true and correct copy of Senate Resolution 3, adopted by the Senate of the State of Oregon on April 3, 1997.

12. I have spoken on several occasions with Mr. James Bryant, Repayment Specialist, Bureau of Reclamation in Klamath Falls. Mr. Bryant has informed me that Reclamation has received from tribes requests under FOIA for correspondence, information, or materials provided to Reclamation by irrigation interests or Association members and that these requests have been filled.

13. Exhibit U is a true and correct copy of a letter from me to Roger K. Patterson, Michael Ryan, and David Nawi dated April 23, 1996, regarding KPOP.

14. In February of 1997, our firm served notices of deposition of two Reclamation employees. One purpose of those depositions was to be able to obtain direct testimony on certain subjects discussed herein on matters that Reclamation or Interior personnel have stated. Another purpose was to adduce testimony which I believe would contravene certain assertions of fact made in the Defendants' Motion for Summary Judgment. After defendants moved to quash the

depositions and after discussion by Mr. Hitchings with Ms. Kobbervig, our firm elected to avoid the cost of discovery disputes and wait until after defendants' motion for summary judgment to pursue discovery, if any.

15. Exhibit V is a true and correct copy of a letter from Andrew M. Hitchings, De Cuir & Somach, to Freedom of Information Act Appeals Officer, Department of the Interior, dated September 13, 1996.

16. Exhibit W is a true and correct copy of President's Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993).

17. Exhibit X is a true and correct copy of United States Attorney General's Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, dated October 4, 1993.

18. Exhibit Y is a true and correct copy of 97 Interior Dec. 21 (July 6, 1989).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 14th day of April, 1997 at Sacramento, California.

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS

To: Files

From: James K. Bryant

Subject: Meeting with Native American Tribes Concerning the Operation of Upper Klamath Lake and the Klamath River System on September 22, 1994.

On September 22, 1994, Reclamation again met with the four Native American Tribes that depend upon the Klamath Basin to discuss our operations. Attendance was as follows:

Yurok Tribe	Karuk Tribe
Troy Fletcher, Fish Biologist PO Box 218 Klamath CA 95548	Robert Rohde, Fish Biologist PO Box 282 Orleans CA 95556 916-627-3446
Klamath Tribes	Hoopa Valley Tribe
Elwood Miller, Natural Resources Spec. Craig Bienz, Nautral Resources Dir. PO Box 436 Chiloquin OR 97624	Robert Franklin, Hydrologist PO Box 417 Hoopa CA 95546 916-625-4267

Reclamation

Mike Ryan, Area Manager
James Bryant, Chief, Operations
Robert Davis, Chief, Planning
Mark Buettner, Fish Biologist
Klamath Basin Area Office

Fish & Wildlife Service

Tom Stewart, Manager, Klamath Refuges
Steve Lewis, Supervisor, ERO
Gary Hagedorn, Asst, Manager, Refuges
Jim Hainline, Wildlife Biologist
6600 Washburn Way
Klamath Falls OR 97603

The meeting began with the Tribes passing out an agenda that they wanted to follow (copy is attached). The first item was the letter from Roger Patterson to the Klamath Tribes that is presently being prepared concerning the meeting on the 24th of August. They want individual letters to each Tribe. The following positions were then stated by the various Tribes:

Rohde - Karuk Tribe - Their position is the same as in the 1992 Tribal Resolution previously given to Reclamation (4,137.0 on the lake year round and FERC Mins below Iron Gate Dam). Mr. Rohde stated that 4,139 should be used to support the subsistence fishing industry that could be developed again. They believe that the Klamath River fish are moving because of the 900 cfs. They want money for studies and suggested a basin wide study.

Fletcher - Yurok Tribe - They demanded FERC Mins below Iron Gate. They believe that the Burden

of Proof falls on Reclamation to prove that we do not harm the salmon when we drop below FERC Mins. He said that there are lots of fish in the lower Klamath River.

Franklin - Hoopa Valley Tribe - They want a written management plan. They do not want any water delivered to Klamath Drainage District this fall. The Tribe wants us to furnish them a record of decision for going below FERC Mins at Iron Gate. They also want to be part of any decision process (through Tribal Consultations) on water allocations.

Miller - Klamath Tribes - Water level of Upper Klamath Lake is too low and the fish in the lake are in a stressful condition. Wants us to provide the Tribes with a water budget. There can be no allocation to the farmers without an involvement by the Tribes. The Tribes are contemplating a law suit with Reclamation over Indian Trust and ESA responsibilities.

Several Tribal representatives stated that we have been wrong in our operation of the Klamath Project. Indian rights are superior and we have ignored their needs. They claim we are in violation of the Trust Relationship that is required by the Constitution.

Tom Stewart and Gary Hagedorn explained that the Lower Klamath Refuge is about 50% flooded at this time. They need more water than they are getting. Lower Klamath is the only place for the birds to go. 10-12,000 birds have been lost to botulism this year and the losses are continuing to mount. They expect greater than normal bird use this fall. Water from Tule Lake has been used to flood White Lake.

Rohde suggested that Lower Klamath be re-operated to act as an offstream reservoir, providing summer inflow to the Klamath River. The entire Klamath Drainage District could be operated like the historic water cycle of flood in the winter and provide sustainable flows to Kalmath River in the summer.

Mark Buettner stated that the 4,137.0 is the BO minimum and until better data is available we should not vary from the BO. Mark stressed that a lot of cooperation is taking place between the Tribes and Reclamation on studying the suckers. WQ in the lake has been improving for several weeks as a result of cooler weather. Mark does not believe that the blue green algae is a problem this year and that the suckers will not be seriously affected by low water levels in the lake.

The Tribes believe that the risk associated with going below 37.0 is significant and can't be tolerated. Craig Bienz believes that the fish may well go extinct before a threshold elevation is found. There is more that we don't know than we do about the suckers and what is killing them. Craig believes that we may have lost four of the last five years of age class in the lake. The Klamath Tribes believe that the minimum elevation on the lake should be 4,138.5 to 4,139.00. Once we dropped below that level we began to experience fish kills this year.

The Tribes want us to schedule another meeting to lay out our operation plans in accordance with their wishes. The bottom line is not less than FERC Mins, elevation no lower than 37.0 and 95% exceedance factors for projection of inflows. No water to farms or refuges unless these demands are met. Mike suggested a Reclamation Trust Asset Specialist be present at the next

meeting. The Tribes seemed to be OK with this, but not with the idea of including any water users in the meeting. They flatly rejected the concept of having a representative of the irrigators in the meeting, stating that it is a Trust responsibility that will not be debated. The meeting is Government to Government in nature. The irrigators may contact the Tribes for their own meetings.

Troy believes that the pulsed flows this last summer were a last resort. Any success we had with numbers means nothing. If we would have had full FERC flows we would have had greater success. He believes that moving the fish out with an artificial pulse may have stressed the fish.

The Karuk Tribe reiterated their July 19, 1992 letter, stating that we are in violation of the Trust by going below 37 on the lake. The Karuks believe that they have been charged by the Creator with the responsibility of protecting the environment in the Klamath Watershed. Mike responded that the Trust is not an elevation or a flow, but rather the resource. We do not believe we are seriously impacting the resource. The Tribes want a justification letter from us describing the biologic reasons for going below 1,300 cfs and elevation 4,137.0. Further, they want us to return the lake to 37.0 as soon as possible without reducing the flow of the river below 900 cfs. As of September 22, 1994, the lake is 4,136.94.

They again stated that they do not want the irrigation interests involved at this time. They are a sovereign Nation and their Trust assets are not subject to debate.

The Tribes all demanded that we do not release the 6,000 acre-feet of harvest water after October 1. They believe that minimum elevations be maintained in the lake even after September 30, 1994. They wanted our decision immediately. Mike said that he would make that decision in the morning and meet with Rohde at 10.00 a.m. the next day.

We agreed to continue attending meetings with the Tribes. The next meeting will be sometime during the first half of October. Mike will contact Roger Patterson and Mike Spear.

Addendum

After the meeting it was decided to advise Rohde that we will deliver the water to the irrigators for harvest water after the 1st. This will depress the lake level approximately 0.1 foot. Mr. Rohde will be informed by Mike Ryan by letter. In addition, we agreed to notify all of the tribes.

WBR:JBryant:jld:9/26/94: (503) 883-6935
H:\ .\O&M\UKL&LINK\Trib0922.94)

[Seal Omitted]

The Klamath Tribe
P.O. Box 436
Chiloquin, Oregon 97624
Telephone (503) 783-2219
FAX (503) 783-2029

December 27, 1994
[Received: Dec. 30, 1994]

Hon. Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

re: Reinitiation of formal consultation pursuant to Endangered Species Act §7 and operation of the Klamath Irrigation Project; 60-day notice of violation and intent to sue

Dear Secretary Babbitt:

Operation of the Klamath Irrigation Project by the Bureau of Reclamation in Oregon and California has direct effects on two endangered fish species: the Lost River sucker and the shortnose sucker. These species inhabit Upper Klamath Lake which the Bureau manages as a reservoir for the Project. The species were listed as endangered in 1988. Formal consultation between the Bureau and the U.S. Fish & Wildlife Service resulted in a July 22, 1992, Long Term Biological Opinion (LTBO) concluding that the Project does jeopardize the continued existence of the fish. The LTBO went on to provide certain reasonable and prudent alternatives

for Project operation that the Service asserted would avoid such jeopardization. The LTBO also called for further research into the needs of the fish and the effects of Project management on their survival.

Since the LTBO was written significant research has been carried out on several fronts. Also, in 1994 the Bureau managed the Project in a way that lowered Upper Klamath Like to levels never before experienced, offering an opportunity to gain further knowledge about the effects of project management on fish habitat. In addition, certain premises on which the LTBO is based are now known to be incorrect. These factors, and others, make it clear that the best scientific and commercial data available require the conclusion that the LTBO is no longer adequate to protect the two listed species from extinction by Project operations, even if the current reasonable and prudent alternatives are adhered to by the Bureau. Indeed, all available data indisputably show that, under the current LTBO, in 1992 and 1994 the entire year classes of endangered fish were lost.

The purpose of this letter is to request that the Bureau and the Service reinitiate formal consultation under the Endangered Species Act so that the LTBO can be revised to reflect new knowledge and to protect the endangered fish. At 50 CFR § 402.16 four criteria are set out, any one of which triggers mandatory reinitiation of consultation. At least three of those criteria are satisfied in the current situation. Two of these three are satisfied in more than one way.

I will discuss each of those criteria in turn. But before doing that let me point out three important aspects of the matter. First, all of the information

necessary to reach a decision on reinitiation of consultation has been in the hands of the Service and the Bureau long enough to allow a reasoned decision. The reinitiation decision of course depends in large part on new information gathered since the 1992 LTBO was written. The Bureau and the Service have had most of that information since August. They have had *all* the information at least since a November 30, 1994, conference of tribal, Service, and Bureau biologists. That conference was followed by a December 16 meeting with those biologists, the Klamath Project Manager and his staff, and District representatives of the Service at which the information was again discussed in detail. Despite this review, the agencies have not been willing to make a commitment to undertake reinitiation. They have offered no reason for not reinitiating consultation and have said they view reinitiation as a likely step. But they have not begun the process nor have they made any commitment to do so. It is time now to reach a decision on the simple, threshold question of whether to reinitiate.[1]

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[1] The Bureau and the Service have chosen not to develop an analysis of the new information themselves. Rather they have awaited the Tribes' analysis of the new information, and have now elected to send that tribal analysis "out for peer review" to several federal agencies with no fixed return date. The Bureau says that after this federal peer review, a similar process will be undertaken with state agencies and with the public.

The enormous delays threatened by this cumbersome process are unnecessary and will be entirely ineffective because (1) neither the Secretary, nor the Bureau, nor the Service has ever operated the Project, or based its Endangered Species Act decisions, on peer review of this type, (2) nobody in any agency has offered any reason why the new information leads to anything but the obvious conclusion that reinitiation is necessary, and (3) critical information

Second, the need to revise the LTBO is obvious and the data supporting it is overwhelming. Just above, I characterized the reinitiation decision as "simple" in part because the new information is so striking. Studies commissioned by the Bureau show that Project operations under the existing LTBO have allowed the complete loss of the entire year-class of both species of endangered suckers in two of the last three years. (Those years were 1992 and 1994, the two low-water years since the LTBO. If 1995 is another low water year there is no reason to hope for year-class survival under the current LTBO.) This fact is not in dispute. It is established by independent studies commissioned by the Bureau and performed by Oregon State University. This alone is enough to compel reinitiation.

Third, time is critical. If the Bureau is to operate the Project in 1995 pursuant to a meaningful and effective LTBO, the process of reinitiation must begin right away. Bureau plans currently call for irrigation water deliveries to begin in mid-April. By that time the Project must have the guidance of a new LTBO if it is to avoid further fish kills.

With this brief background, let me turn to the criteria compelling the Bureau and Service to reinitiate consultation pursuant to 50 CFR § 402.16.

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like the year-class losses is not even a part of the review, so nothing will be gained by the delay. In short, there is no reason why the agencies should not reach a prompt decision on whether to reinitiate.

CRITERIA FOR REINITIATION OF §7 CONSULTATION

50 CFR § 402.16(a): The amount or extent of taking specified in the incidental take statement is exceeded.

The 1992 LTBO allows certain incidental take of endangered suckers by Project operations.[2] At page 40 the Incidental Take Statement of the LTBO specifically provides that "[c]onsultation should be reinitiated if take occurs . . . as a result of the project . . . activity not specified in this biological opinion."

In 1994 Project activities went beyond those specified in the Biological Opinion as the Project was operated in disregard of the reasonable and prudent alternatives of the LTBO. In particular, the LTBO required that the level of Upper Klamath Lake not be drawn below 4137.0 feet above sea level. Despite this clear requirement, the Bureau drew the lake below that elevation, and maintained the surface elevation below

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[2] The LTBO's incidental take statement is itself fatally flawed. At LTBO page 40 the statement can be read to allow *all* the endangered fish to be killed as incidental take. The statement provides that "[a]ny suckers in the water delivery systems including canals, drains, fields, headgates, and turnouts" and "[s]uckers in the Klamath Project lakes and reservoirs" can be killed as incidental take.

These locations describe nearly all the habitat used by the fish (except for certain spawning streams tributary to the Lake); these locations are of course described as important fish habitat in the LTBO. Allowing unlimited take of fish in all these locations unavoidably allows their extinction. Nothing could be further from the purpose and letter of the Act. The LTBO must be rewritten to correct this deficiency.

the level specified in the LTBO for more than six weeks.

Both before and during this violation of the LTBO take occurred. In particular, at least one dead adult sucker was found near Hagelstein Park on the east shore of the Lake in late September during the period of violation. This fish kill is take that exceeds the amount specified in the incidental take statement. Both the CFR and the LTBO itself require reinitiation of consultation in this circumstance.

50 CFR § 402.16(b): New information reveals effects of the action that may affect listed species in a manner or to an extent not previously considered.

This criterion is met in three related but separate ways, any one of which is sufficient to require mandatory reinitiation of consultation.

* As mentioned above, since the time the LTBO was written a great deal of research and analysis has been done regarding the habitat requirements of the suckers, the effects of Project operations, and the adequacy of LTBO requirements to protect the fish. This work makes it painfully clear that the reasonable and prudent alternatives in the LTBO are inadequate to protect fish from lethal water quality deterioration.

Attached here is a copy of the December 8, 1994, letter from the Tribes' Chief Biologist Craig Bienz to biologists from both the Service and the Bureau. The letter follows up on a meeting at which those scientists shared the results of their research.

As the letter makes clear in its narrative, statistics, and graphs, water quality deterioration–often to lethal levels–is directly correlated to Project management of Lake water levels and inflow-outflow regimes. This was not previously considered in the LTBO. Rather than repeating the details of that analysis, I will incorporate that letter here by this reference and commend it to your study. It makes clear that the management requirements of the LTBO's reasonable and prudent alternatives are not adequate to protect the fish from extinction due to lethal water quality conditions including elevated pH and reduced dissolved oxygen levels. In particular the Lake elevations, and their timing, as specified in the LTBO (for example the 4139.0 foot elevation) cause lethal water quality conditions to occur frequently.

Now that the effects of Project operations on water quality are better understood, and because the deterioration of water quality has a direct effect on the endangered fish, the LTBO must be rewritten to incorporate this new information that reveals effects not previously considered.

* The 1992 LTBO predicts the existence of "refugial areas" to which it trusts the fish will repair during times of lethal water quality elsewhere in the Lake brought on by Project activities. In 1994 Bureau management relied heavily on the "refugial areas" provisions of the LTBO as it drew the Lake down to levels never before experienced. The Bureau anticipated that water quality would suffer, but it trusted that the fish would resort to the "refugial areas" for survival.

Unfortunately, the "refugial areas" did not prove effective. In 1994 the Bureau conducted radio-tracking studies of adult suckers in the Lake. These studies showed conclusively that the fish do *not* make use of "refugial areas" in the ways anticipated by the LTBO. Rather, the fish absorb the full brunt of water quality deterioration and riparian habitat loss caused by artificially low Lake elevations.

Neither the Bureau nor the Service previously considered the fact that the concept of "refugial areas" is not valid in the instant context. The LTBO must be revised in its reliance on the concept.

* The LTBO does not consider the effect of Project operation on overwinter survival of fish. It is clear that winter kill is a problem that is exacerbated by artificially low Lake levels brought on by Project operation.[3] Project management withdraws water in the fall, leaving Lake levels artificially low as winter freezes the Lake surface. As the attached article explains in detail, this correlates strongly with degraded water quality caused by an increased oxygen depletion rate.

The existing LTBO has not previously considered this effect of Project operations on the endangered fish. The LTBO must be revised to address this problem.

<u>50 CFR 402.16(c): The Project action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the LTBO</u>.

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[3] See, for example, Mathias and Barica, "Factors Controlling Oxygen Depletion in Ice-Covered Lakes," Can. J. Fish. Aquat. Sci., Vol. 17, p. 185, 1980 (copy attached).

This criterion is met in two ways, either of which is sufficient to require mandatory reinitiation of consultation.

* The 1992 LTBO is based on a Biological Assessment provided to the Service by the Bureau. That Assessment informed the Service that Bureau irrigation water withdrawals from Upper Klamath Lake end in September, and that the Lake begins to refill in October. As a result of this representation by the Bureau, the LTBO does not address Project management of the Lake after September.

In 1994 Project operation was modified. Water withdrawals continued into October, continuing to draw Lake levels down. This compromises the attainment of depths necessary to protect water quality and to minimize winer kill.

This modification of Project management has a direct effect on listed species. That effect was not considered in the LTBO. The LTBO must be rewritten to consider these effects.

* Project management was further modified in 1994 as it drew Lake levels down to elevations never before experienced. The LTBO as written anticipates Project management within the range of Lake levels historically experienced. The drawing down of the Lake below 4137.0 feet in 1994 took management outside that window of experience.

No consideration is given in the LTBO to the effect of such a management regime on the endangered fish. Obviously a change in Project operations that leaves the Lake with less depth than at any time in history is

deserving of consideration in the LTBO. Reinitiation of consultation is needed to include this consideration.

CONCLUSION

The 1992 LTBO may never have been adequate to the task of protecting Lost River and shortnose suckers from extinction by operation of the Klamath Irrigation Project. Be that as it may, it is now clear that several shortcomings exist in the document and that it must be revised if it is to avoid further jeopardization, and extinction, of the endangered fish. The Endangered Species Act and the regulations promulgated thereunder contemplate such an eventuality and they *require* reinitiation of consultation both by the Bureau and the Service. 50 CFR § 402.16.

First, as regards reinitiation criterion (a), the "take" of the endangered species has exceeded that anticipated by the LTBO. This means the LTBO has not properly anticipated the effect of Project operations. The LTBO is not protecting the fish as effectively as intended, or as required by the Endangered Species Act. It must be rewritten to be brought into compliance with the Act and its goals.

Second, as regards reinitiation criterion (b), recent Lake elevation management has offered an opportunity to study Project management's effects on fish in ways not previously possible. Also, ongoing Lake studies have added three years of valuable data since the time the LTBO was written. The resulting new information reveals that the Project adversely affects the fish in ways not previously considered. The LTBO needs to be rewritten to incorporate this new and valuable information.

Third, as regards reinitiation criterion (c), the LTBO is based on a description of Project actions that is no longer accurate because Project management has been modified. The changes in management have adverse effects on the endangered fish. The LTBO must be rewritten to consider the full range of Project effects. Otherwise effects not considered in the LTBO will continue to push the fish toward extinction.

Under these circumstances reinitiation of formal consultation is required by the Act and the regulations. At 50 CFR § 402.16 provision is made for either the Bureau or the Service to take the necessary action. Neither agency needs to wait for the other to act. Thus far no action has been taken. This is a violation of the Act and the regulations.

Accordingly, the Klamath Tribes respectfully demand that the Bureau and/or the Service immediately reinitiate consultation pursuant to the Endangered Species Act and regulations. This is the only responsible step for the Department in light of the best available scientific and commercial data. In order to protect the Tribes' right to continue the struggle to avoid extinction of resources important to the physical and spiritual well-being of our people, I am required to add the following.

This letter provides written notice of violation of the Act and regulations as described above. It is also the Tribes' 60-day notice of intent to sue pursuant to the Act, including 16 USC § 1540, if the actions demanded herein are not taken by you and the Department.

This letter is also the Tribes' 60-day notice of intent to sue in connection with violations of the Act brought

to your attention in my letter of November 28, 1994. A copy of that letter is attached here and incorporated by this reference. As you will recall, that letter pointed out that the Klamath Irrigation Project is operated without the pre-season operating plans and criteria required for protection of endangered species and tribal treaty rights. If the inadequacies and violations described in that letter are not corrected, we will have no choice but to file suit.

I regret having to end this letter in this tone, but such are the requirements of the law. Unfortunately the Tribes have no assurance that the Endangered Species and treaty rights concerns set out in this and my previous letter will be addressed in time to save these fish from extinction. Time is truly a critical factor, especially with the 1995 water management season approaching soon. I urge you to give these matters the highest priority within the Department.

Thank you very much for your attention to these important matters.

Very truly yours,

/s/ ILLEGIBLE

Marvin Garcia
Chairman

cc: Roger Patterson, Regional Director, BOR
Mike Ryan, Klamath Project Manager
Mike Spear, Portland Regional Director, USFWS
Dale Hall, Deputy Portland Regional Director, USFWS
Daniel Beard, Commissioner, BoR
Mollie Beatty, Director, USFWS
Ada Deer, Ass't Secretary for Indian Affairs
George Frampton, Ass't Secretary for Parks and Wildlife
Michael Anderson, Associate Solicitor for Indian Affairs
Hoopa Valley Tribe
Karuk Tribe
Yurok Tribe

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February 5, 1996

Michael Ryan
James Bryant
Bureau of Reclamation
6600 Washburn Way
Klamath Falls, Oregon 97603

Re: Freedom of Information Act Request

Gentlemen:

This is a Freedom of Information Act Request. Within the period provided by law, please provide copies of the following documents.

1. From December 1, 1995, to and including the date of responding to this request, all letters and/or records of communications, verbal and otherwise, to or from any or all of the following:
   a. DeCuir & Somach, including but not limited to Paul Simmons, Stuart Somach, and Don Mooney;
   b. the Klamath Basin Water Users Association, including but not limited to, David Zeppone;
   c. David Solem;
   d. Earl Danosky;

   e. Marshall Stanton;
   f. the Tule Lake Irrigation District;
   g. the Klamath Irrigation District;
   h. the State of Oregon Water Resources Department;
   i. the State of Oregon Department of Environmental Quality;
   j. the California North Coast Regional Water Quality Control Board;
   k. David Vogel;
   l. Keith Marine;
   m. Pacifi Corp;
   n. Roger Patterson;
   o. Kirk Rogers;
   p. Les Ramirez; and
   q. Klamath County, including, but not limited to its Board of

2. The statutes, regulations, deeds, instruments or permits by which in 1905 the State of California transferred to the Klamath Project and/or the Bureau of Reclamation (the "Klamath Project/BOR") the right to use the then unappropriated waters of the Klamath and/or Lost Rivers;

3. Any and all operations plans, other than the 1995 Interim Operations Plan, by which the Klamath Project/BOR has agreed to operate, or has operated, the Klamath Project;

4. All writings of any kind, including memoranda, reports, correspondence and other documents,

discussing the quanitification of the reserved water rights of the Yurok, Hoopa or Karuk Tribes;

5. For the period from October 1, 1995, to and including the date of responding to this request, all documents which show or state the amounts of water delivered by the Klamath Project to any Project customers or users, including the date and amount of water delivered, and the point to which the water was delivered[1];

6. For each and every delivery identified in response to the previous request, all documents which show, state, describe or discuss whether and how the Klamath Project/BOR determined that the delivery of water was in excess of and/or not required to satisfy the reserved water rights of the Yurok, Hoopa, Karuk or Klamath Tribes; and

7. Any and all permits or licenses issued by the California State Water Rights Board and/or the California State Water Resources Control Board to the Klamath Project/BOR.

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[1] A summary of such documents is acceptable.

With best regards.

Very truly yours,

ALEXANDER & KARSHMER

/s/ ILLEGIBLE

Richard A. Cross

[Seal Omitted]

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, Oregon 97603

KO-110 [MAR. 4, 1996]
RIM-6.10

Alexander & Karshmer
Richard A. Cross
2150 Shattuck Avenue, Suite 725
Berkeley CA 94704

Subject: Freedom of Information Act (FOIA) Request. Your Letter Dated February 5, 1996 and February 12, 1996

Dear Mr. Cross:

This letter is in response to your February 5, 1996 Freedom of Information Act (FOIA) request.

Question # 1

Enclosed please find the following documents:

Letter to Roger Patterson dated 2/16/96 from Lynn Long (control #6-1627)
Letter to KPOP Working Group dated 2/23/96 from Gary Baker
Letter to KPOP Working Group dated 2/15/96 from Gary Baker
Letter to KPOP Working Group dated 2/06/96 from Gary Baker

Letter to KPOP Working Group dated 1/25/96 from Gary Baker
Letter to KPOP Working Group dated 1/09/96 from Gary Baker
Letter to KPOP Working Group dated 12/22/95 from Gary Baker
Letter to KPOP Technical Group dated 12/22/96 from Gary Baker
Letter to KPOP groups dated 12/22/95 from Mike Ryan
Letter to KPOP Technical Group dated 12/1/95 from Gary Baker
Letter from DeCuir and Somach dated 2/15/96 and attachments (control #6-1609)
Letter from Dave Zepponi dated 2/27/96 to Secretary of Interior (control #6-1636)
Letter from Dave Zepponi dated 2/20/96 to Mike Ryan and Mark Buettner (control #6-1320)
Letter from Dave Zepponi dated 2/22/96 to Gary Baker (control #6-1623)
Letter from Dave Zepponi dated 1/1/96 to Mike Ryan (control #6-1584)
Letter from Dave Zepponi dated 2/7/96 to Jim Bryant (control #6-1585)
Letter to Dave Zepponi dated 2/26/96 from Mike Ryan
Letter to Dave Zepponi dated 12/15/96 from Gary Baker
Letter to Dave Zepponi dated 12/1/96 from Mike Ryan
Letter to Dave Solem dated 2/13/96 from Mike Ryan
Letter to Dave Solem dated 2/12/96 from Jim Bryant
Letter cced to Dave Solem dated 2/6/96 from Jim Bryant
Letter cced to Dave Solem dated 2/2/96 from Jim Bryant
Letter cced to Dave Solem dated 1/23/96 from Jim Bryant

Letter cced to Dave Solem dated 1/8/96 from Jim Bryant
Certificate of Insurance issued to KID dated 1/4/96 (control #6-1404)
Letter from KID dated 12/1/96 to Mike Ryan (control #6-1128)
Letter to Earl Danosky dated 2/26/96 from Jim Bryant
Letter to Earl Danosky dated 2/23/96 from Jim Bryant
All-Purpose Acknowledgment from State of California for Irrevocable Election associated with Tulelake Irrigation District dated 2/13/96 (control #6-1599)
Letter from Earl Danosky dated 1/1/96 (control #6-1397)
Letter to Earl Danosky dated 2/26/96 from Jim Bryant
Letter cced to TID dated 2/26/96 from Jim Bryant
Letter to Earl Danosky dated 2/23/96 from Jim Bryant
Letter cced to TID dated 2/22/96 from Jim Bryant
Letter cced to TID dated 2/1/96 from Jim Bryant
Letter cced to TID dated 2/2/96 from Jim Bryant
Letter cced to TID dated 12/8/95 from Jim Bryant
Letter to Marshall Staunton dated 12/4/95 from Gary Baker
No letters/documents found sent to or received from State of Oregon Water Resources Department
Letter from Oregon DEQ dated 2/12/96 to Mark Buettner (control #6-1608)
Letter to Oregon DEQ dated 12/26/95 from Gary Baker
No letters/documents found sent to or received from North Coast Regional Water Quality Control Board
Letter from Dave Vogel dated 12/28/95 to Gary Baker (control #6-1286)
No letters/documents found sent to or received from Keith Marine
Letter from PacifiCorp dated 3/1/96 to Mike Ryan. (control #6-1638)

Document from PacifiCorp dated 2/15/96 entitled: PacifiCorp Review of KPOP Alternatives (control #6-1607)
Letter from PacifiCorp dated 2/2/96 to Gary Baker (control #6-1572)
Letter from PacifiCorp dated 1/26/96 to Mark Buettner (control #6-1562)
Letter from PacifiCorp dated 12/29/95 to "Planholder" and cy of Acknowledgement of Receipt from Jim Bryant (control #6-1419)
Letter cced to PacifiCorp from Fish and Wildlife Service dated 12/11/95 to Mike Ryan (control #6-1158)
Letter to PacifiCorp (Dale Foresee) dated 1/12/96 from Mike Ryan
Letter to Doug Bornemeier (PacifiCorp) dated 12/8/95 from Gary Baker
Letter from Roger Patterson dated 2/15/96 to "All Corncerned" (control #6-1634)
Letter to Roger Patterson (cced to Mike Ryan) dated 2/2/96 (control #6-1587)
Letter from Roger Patterson dated 1/31/96 to "All Concerned" (control #6-1605)
Letter to Roger Patterson dated 1/31/96 (cced to Mike Ryan) (control #6-1577)
Letter from Roger Patterson dated 1/23/96 to "All Concerned" (control #6-1574)
Letter to Roger Patterson dated 2/26/96 from Mike Ryan
Letter to Roger Patterson dated 2/26/96 from Jim Bryant
Letter to Roger Patterson dated 2/2/96 from Mike Ryan
Letter to Roger Patterson dated 2/1/96 from Jim Bryant

Letter to Roger Patterson dated 1/25/96 from Mike Ryan
No letters/documents found sent to or received from Kirk Rodgers
Letter to Les Ramirez/Roger Patterson/David Cottingham dated 1/9/96 from Yurok Tribes (control #6-1426)
Letter from State of Oregon dated 2/20/96 to Teena Baker (this office) cced to Board of Supervisors, Klamath County (control #6-1624)
Letter to DEQ from City of Klamath Falls dated 2/12/96 (control #6-1596) (copy rec'd for our records)
Letter from Klamath County Board of commissioners dated 2/16/96 to Mike Ryan
Document from Water Resources Department of Oregon (rec'd 2/1/96) (Control #6-1570)
Letter from Klamath County, Board of Commissioners dated 1/15/96 to Mike Ryan (Control #6-140)
Letter to Klamath County dated 1/23/96 from Jim Bryant
Letter from PacifiCorp dated 2/28/96 to Mike Ryan (control #6-1639)
Letter from PacifiCorp (draft) dated 2/26/96 re: Tulana Farms

Question # 2

Prior to December 19, 1914, appropriative water rights could be acquired in California by posting and recording a notice stating the nature and quantity of the proposed appropriation and by thereafter exercising due diligence in putting the water to beneficial use.

Klamath River—Water is not diverted from the Klamath River in California for the Project. Therefore, no appropriations were filed with the State of California.

Lost River—The following postings were made:

1. Notice of Appropriation of all the unappropriated waters, approximately 10,000 miners' inches (equivalent to a flow of 250 cubic feet per second) (in California and Oregon a flow of 40 miners' inches is equivalent to a cubic foot per second), and maximum flow of 150,000 miners' inches, of Willow Creek, Miller Creek, Clear Lake and its tributaries, and Lost River in Modoc County, California, was posted on behalf of the United States at the intended point of diversion on July 8, 1909, and was filed and recorded July 14, 1909, in Volume 2, Page 84 of "Water Claims," Modoc County, California.

2. A previous notice of appropriation covering 5,000 second-feet of the waters of Lost River was posted December 19, 1904, and recorded on December 28, 1904, on Page 15 of Volume 2 of "Water Claims" of Modoc County. This notice was also recorded in Klamath County, Oregon, Volume 1, at Page 185, "Water Rights."

3. A Notice of Appropriation of all of the unappropriated waters of Willow Creek, Mill Creek, Clear Lake, Lost River and Tributaries, etc., being an average yearly flow of 10,000 miners' inches (250 cfs) and maximum flow of 150,000 miners' inches, was posted relative to diversion in Sections 22, 23, 26, and 27 of T.48N., R.7E., MDB&M, and was recorded April 9, 1910, on Page 132 of Volume 2 of "Water Claims," Modoc County.

4. A nearly identical notice concerning diversion in Sections 25, 26, 35, 36 of T. 48 N., R. 7 E., MDB&M, was posted and recorded on April 9, 1910, on Page 134 of Volume 2 of "Water Claims," Modoc County, California.

Question # 3

Prior to the 1995 Interim Operation Plan there were no formal operation plans.

Question # 4

Reclamation does not have any documents relating to quantifying reserved water rights of the Yurok, Hoopa or Karuk Tribes.

Question # 5

Monthly water delivery records are included for the following delivery points:

- A Canal (Diverts directly from Upper Klamath Lake)
- Station 48 (Diverts from the Lost River Diversion Channel)
- Miller Hill Pumping Plant (Diverts from the Lost River Diversion Channel)
- North Canal (Diverts from the Klamath River)
- Ady Canal (Diverts from Klamath River)
- West Canal in Langell Valley (Includes water released from Clear Lake)
- East Malone Lateral in Langell Valley (Includes water released from Clear Lake)
- North Canal in Langell Valley (Includes water released from Gerber)

Daily flow records are also available if desired. The individual districts maintain records of water deliveries.

Question # 6

To our knowledge, no quantifying reserved water rights of the Yurok, Hoopa or Karuk Tribes has been completed by the Interior or Justice departments. Therefore, it would not be possible for Reclamation to determine if water deliveries described in question # 6 were in excess of and/or not required to satisfy the reserved water rights of the named Tribes.

Question # 7

There have been no permits or licenses issued by California State Water Rights Board or California State Water Resources Control Board to the Klamath Project.

The following is a summary of charges for this Freedom of Information Act request:

16 quarter hours of professional research @4.65 per qtr. hr:		74.40
853 copies of documents @ .13 per copy:		123.89
40 quarter hours of administrative/clerical work time @2.30:	Total cost:	92.00 289.29

Fees are assessed when the cost of the request is estimated at over $15. You are considered non-commercial and the cost above reflects two hours of search time free and the first 100 copies free. Interest will be charged in accordance with the Debt Collection Act of 1982, 31 U.S.C. 3717, and implementing regulations in 4

CFR 102.13, if the fees are not paid within 30 calendar days of the date of this billing.

Enclosed you will find a pre-addressed envelope for your convenience in mailing payment. If you have any questions, please don't hesitate to call me at (541)883-6935.

Sincerely,

/s/ MICHAEL J. RYAN
MICHAEL J. RYAN
Area Manger

Enclosures

ALEXANDER & KARSHMER
ATTORNEYS AT LAW
(A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION)
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March 15, 1996
[Received: Mar. 18, 1996]

Roger Patterson
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Michael Ryan
Bureau of Reclamation
6600 Washburn Way
Klamath Falls, Oregon 97603

Re: Water Required to Be Made Available by the Klamath Project in Satisfaction of the Upper Klamath Basin Component of the Yurok Klamath River Anadromous Fishery Reserved Water Right and the Trust Responsibility

Gentlemen:

The purpose of this letter is to reiterate and state as clearly as possible what the Yurok Tribe has already set forth at length in the Trihey and Balance reports and the March 5 and 6 letters from Susie Long and me, all of which were mailed to you last week. As explained below, that mailing was and is an evidentiary showing regarding the approximation of the Upper Klamath

Basin component of the Yurok Klamath River anadromous fishery reserved water right (the "Yurok Showing").

At page 27 of the Trihey report there is a water release schedule (the "Release Schedule"). The Schedule is a statement of the amounts of water required to be released, passed through, or spilled by the Klamath Project in order to satisfy the Upper Klamath Basin component of the Yurok Klamath River anadromous fishery reserved water right. A copy of the Schedule is enclosed with this letter.

Although the Schedule and the Yurok Showing may be of use to Reclamation in developing a "water advisory," or an interim operations plan, or a final operations plan, should any of these planned documents see the light of day, the primary purpose of the Showing is *not informational*. Rather, it is a statement of the actions currently required to be taken by Reclamation and the Klamath Project as a result of the Yurok Tribe's approximation of the above referenced reserved water right.

Compliance with the Schedule is obligatory for the following reasons.

The Yurok Tribe is the holder of a reserved water right for instream flows necessary for the maintenance and recovery of the Klamath River anadromous fishery. My letters to you of March 13, 1995 and March 6, 1996, and the Regional Solicitor's July 25, 1995 memorandum to you, establish this fact. Although, as noted by the Regional Solicitor, this right has yet to be judicially unquantified, Reclamation is not free to ignore it or to refrain from taking whatever steps are necessary to

determine as precisely as possible the extent and nature of the right and to ensure that the operations of the Klamath Project do not trespass against the right or otherwise violate it. To the contrary, by virtue of the law of water rights *and* the federal trust responsibility, Reclamation is required to martial the available reliable relevant scientific evidence regarding quantification of the right and to "approximate"[1] what a court would hold the right to be. In other words, Reclamation has a present duty administratively to approximate as precisely as possible the extent and nature of the above referenced reserved water right.

Notwithstanding this duty, and notwithstanding the development for the better part of the last year of what Reclamation has billed as a Klamath Project Operations Plan, as of March 4, 1996, Reclamation had not mustered *any* information regarding quantification of the Yurok reserved right. (See Request No. 4 of my February 5 FOIA and Mr. Ryan's March 4 response.) And unless someone besides the Yurok Tribe has come forward with significant, reliable evidence on the question of approximation since then, the Yurok Showing is the *only* evidence available to Reclamation regarding the extent and nature of its present duty to satisfy the Upper Klamath Basin component of the Yurok Klamath River anadromous fishery reserved water right.

The Tribe expects and demands, therefore, that water be released in the amounts, and at the times, shown in the Schedule. I reiterated this demand to Mr. Ryan in a telephone conversation we had on March 12,

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[1] The term is Mr. Ryan's.

and I repeated the same to David Nawi in a telephone conversation he and I had on March 14.

If, in spite of the Showing, Reclamation intends not to act in accordance with the duty we have articulated, then pursuant to its trust responsibility generally, and the 1995 Memorandum of Agreement signed by Reclamation and the Klamath Basin Tribes in particular, it is required promptly to provide the Yurok Tribe with a full statement of the reasons for its failure to act.

Thank you for your time and attention.

Very truly yours,

ALEXANDER & KARSHMER

/s RICHARD CROSS
RICHARD CROSS, Esq.

Enclosures

cc:
Susie Long, Yurok Chairperson
Elwood Miller, Chair, Klamath River Intertribal Fish and Water Commission
Eluid Martinez, Commissioner
Catherine Vandemoer, Staff Assistant for Water Rights
Anne Crichton, Solicitor's Office
Bob Anderson, Solicitor's Office
David Nawi, Regional Solicitor

[Seal Omitted]

The Klamath Tribes
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FAX (503) 783-2029
800-524-9787

September 12, 1996

The Honorable Bruce Babbitt
Secretary of the Interior
1849 C Street NW
Washington, D.C. 20240

re: Bureau of Reclamation kill of Endangered Species in Upper Klamath Lake; 60-day notice of intent to sue for violation of the Endangered Species Act

Dear Secretary Babbitt:

An unprecedented kill of two Endangered Species is taking place in the Upper Klamath Lake, Oregon. The Lake is managed by the Bureau of Reclamation as part of the Klamath Project. Despite the tragic fish kill Reclamation is continuing to withdraw water from the Lake, reducing habitat and compromising the ability of the surviving fish to persist. I am writing you on behalf of the Klamath Tribes to respectfully request and demand that you instruct Reclamation to stabilize the Lake in order to protect the fish. You are responsible for taking action both under the Endangered Species Act and pursuant to the Treaty between the United States and the Klamath Tribes.

The fish are two species of desert-lake dwelling fish known to us as "c'wam" and "kuptu" and to the non-Indians as "Lost River suckers" and "shortnose

suckers." For thousands of years these fish have provided for the physical and spiritual well-being of our people. We were promised by the United States in the Treaty of 1864, in exchange for our cession of millions of acres of our lands, that the United States would protect our ability to continue to harvest these fish.

Now our fisheries are closed because the populations have collapsed and the fish are listed as endangered. Worse, today the fish are dying by the thousands because of Reclamation's mismanagement of the Lake. Despite our strongest protests Reclamation refuses to take steps to protect these fish. Instead, Reclamation continues its so-called "management" by allowing agricultural users to withdraw as much water from the Lake as they want, without any Interior control whatsoever. A clearer example of an agency's complete capitulation to the interests it is supposed to regulate is hard to imagine. This would be merely illegal and embarrassing were it not resulting in the added, immediate tragedy of the death of tens of thousands of endangered fish.

The situation is remarkably like that of endangered cui-ui fish in Pyramid Lake. There the presence of an endangered species and a treaty-protected fishery caused the federal courts to rule that your office must give priority to fish protection over *all others uses* of the water. *Carson-Truckee Water Conservation District v. Watt*, 549 F. Supp. 704, 710, 713 (D. Nev. 1982). You must assert your control to the fullest extent possible to preserve water for tribal fisheries. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp 252 (D.C. Cir. 1973).

The problem for the fish is caused in large part by reduction of their habitat in the Lake. Since the fish kill began in August Reclamation has continued to "manage" for unlimited withdrawals causing a reduction of 30% of the fish's habitat in the Lake. Reclamation is continuing to allow withdrawals that will push this figure over 50% soon.

Reclamation has offered only the most unpersuasive, nearly preposterous, excuses for its refusal to respond to this crisis by keeping more water in the Lake. The excuses only serve to highlight Reclamation's lack of commitment to, and understanding of, protection of the fish.

For example, Reclamation claims that the bacterial infection that is the direct cause of the deaths will peak. One certainly hopes so, but it has not happened yet in the four weeks of Reclamation inaction. The kill continues today as vigorously as it did two weeks ago. Inaction is not excusable on the grounds that sooner or later Reclamation thinks the kill will abate.

Reclamation also lamely explains that the poor water quality conditions for the fish are caused by atmospheric conditions (low wind and high temperature). Of course, each of these conditions, when adverse, would be mitigated by the retention of more water in the Lake. Reclamation's explanation wholly misses the point.

For scientific reasons explicitly laid out in a meeting on Friday, August 30, federal and tribal biologists agreed that retaining more water in the Lake would maximize the probability of fish survival. Reclamation offers you no justification for inaction in the face of a

tragedy of this magnitude. Instead, it continues to reduce the habitat by withdrawing water needed for the survival of these precious fish. The Endangered Species Act requires that you assure Reclamation's actions do not jeopardize these fish. Obviously that assurance is missing in this situation— fish are dying by the thousands and Reclamation has no plausible excuse for continuing to reduce the habitat.

Surprisingly, Reclamation could use the Project's flexibility to alleviate this situation but, again, it refuses to do so. It has water stored in other Project reservoirs that could be used in place of the water being withdrawn from Upper Klamath Lake. Reclamation simply refuses to use this water because it hasn't been used in the past. Again, this is no justification for inaction.

Mr. Secretary, your obligation in this tragic situation is to do everything in your power to save these fish. That includes stopping agricultural withdrawals from Upper Klamath Lake. The priority water right in this situation is clearly with the fish, and the law clearly requires action.

Once agin, I respectfully request (demand) that you immediately take steps to stabilize the lake surface elevation of Upper Klamath Lake. I also ask that you let me know as soon as possible what steps you intend to take to respond to this crisis.

Thank you very much for your attention to this critical matter.

Very truly yours,

/s/ ELWOOD H. MILLER, JR.
ELWOOD H. MILLER, JR.
Director, Department of
Natural Resources

cc: Patricia Beneke
Ada Deer
John Leshy
David Cottingham
Kate Vandemoer
Bob Anderson

[Seal Omitted]

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February 23, 1996
[Received: Feb. 26, 1996]

Patricia Beneke
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Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

John Leshy
Solicitor
Department of the
Interior
1849 C Street N.W.
Washington, D.C. 20240

Eluid Martinez
Commisioner of
Reclamation
Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

re: Reconciling the KPOP with the Klamath Basin Adjudication

Dear Ms. Beneks, Mr. Leshy, and Mr. Martinez:

Thank you for agreeing to meet with representatives of the Klamath Tribes to discuss this important matter. This letter, in two sections, is offered as preparation for

that discussion. The first section reviews the interests that must be reconciled, and it sets out some of the reasons why a 1996 interim water management plan is both an available and an advisable resolution of the situation.

The second section considers the current foundation of the KPOP, and it explains why this foundation is badly flawed and cannot warrant compromising the Department's effort to protect the Tribes' water rights in the Klamath Basin Adjudication.

1. An interim plan will allow time for deliberate, well-informed decisions on water management in the Klamath Basin

The dilemma. As you are aware, the emerging KPOP may be based on USGS information that does not include the product of study and analysis being done, but not yet completed, in preparation for the Adjudication by experts retained by the BIA. The product of this BIA work will go to the very heart of the questions surrounding Lake management, endangered species, and tribal trusteeship concerns—matters of central interest in the KPOP.

The dilemma for the Department and the Tribes, of course, is that, on the one hand, premature disclosure of the incomplete BIA work or reliance solely on the USGS work will be prejudicial to the Adjudication; on the other hand, proceeding now without the benefit of the BIA work will later pit Interior agencies against one another and, again, could be prejudicial to the Adjudication.

The precedent and the solution. The Tribes believe the solution lies in following the example set a year ago when difficult and potentially controversial issues were presented but did not require immediate resolution. That example includes taking advantage of a non-critical water year to allow implementation of an interim water management plan for the current water year. This would allow the final KPOP decisions to be postponed, the BIA work to proceed to completion, the KPOP to be based on the full range of relevant scientific information and analysis, the potential conflict among agencies to be avoided, and controversy to be minimized.

Fortunately this solution is available this year because, like last year, the water supply appears to be well above the critical level. The Natural Resources Conservation Service report for the Klamath Basin puts the snowpack at 94% of normal Basin-wide, and slightly above that for the Upper Klamath Lake watershed in particular, as of February 14.

You may recall that last year at this time the Tribes requested that Reclamation's 1995 interim management plan include a specific articulation of the legal priorities to water use in the Basin. This was felt by the Department to be a difficult request, and it was deferred because the predicted adequacy of the water year rendered unnecessary the application of legal priorities. Similarly, this year the adequacy of the water supply will render unnecessary water allocation decisions based on the USGS and BIA analyses relevant to critical-year management, and the dilemma described above need not be resolved immediately.

Advantages of an interim plan. *Reconciliation of the KPOP and the Adjudication. An interim plan would allow the BIA work to proceed to completion and to be included in the KPOP product. It would avoid compromising Interior's work in the Adjudication and it would avoid the potential intra-departmental conflict. It would also avoid unnecessary risk of prejudice to tribal water rights.

* NEPA compliance. An interim plan would make the NEPA compliance process much easier. There has not even been time for Reclamation to meet its own NEPA commpliance requirements, as illustrated just below. As you know, the KPOP process has allowed only two weeks for preparation of the Environmental Assessment. This is not adequate, even considereing the quantity of information gathered prior to the two week period.

For example, Reclamation's "Indian Trust Asset Policy and NEPA Implementing Procedures" at IV-8 requires analysis of the "full extent of the impacts . . . [on] social and cultural values" of the Tribes. So far, no contacts with the Tribes have been made by Reclamation to allow such an analysis which must go far beyond the fishery data gathered so far in the KPOP process. Similarly, the Tribes have not been provided an opportunity to participate in the preparation of the EA as required by Reclamation's "ITA-4 B." Their participation will apparently be restricted to reviewing the prepared document, while ITA-4 B plainly requires earlier involvement. Attempts to substitute BIA participation for that of the Tribes are not only inconsistent with Reclamation's rules, they have been ineffective. The Tribes are aware that BIA personnel, asked with little

or no notice to provide assistance in this hasty effort, have been unable to respond. Clearly, more time is needed to do this job correctly and deliberately.

Also, the NEPA precedents at the Newlands Project and the Trinity River strongly suggest that an Environmental Impact Statement is appropriate in the KPOP context, as it was in those two situations. The Tribes believe that the KPOP will require an EIS, and they are aware that this belief is shared by others both within and outside the Department.

* Completion and refinement of existing KPOP processes. An interim plan would allow time to refine and complete the KPOP Technical Memo process. Reclamation has frequently and publicly bemoaned the fact that time constraints are preventing it from giving this process the attention it deserves. As you know, the five Tech Memos have been the subject of voluminous comments and critiques. To date Reclamation has had time to reply only with a summary of the comments. There has not been time to explain how this input has been incorporated (or why it has not been incorporated) in the KPOP products. There has been no real exchange or dialogue with the Tribes, water users, or the public to assure that these concerns have been understood and addressed by Reclamation and its Tech Memo consultant CH2MHill.

As just one example of this situation, consider the recent comments of Balance Hydrologics, Inc., who reviewed some of the KPOP Tech Memos on behalf of several groups interested in this process and represented by the Sierra Club Legal Defense Fund.[1] Balance found the Tech Memos did not give it access to information essential to allow it to evaluate for its clients the foundation of the KPOP decision process. For example, Balance was unable to evaluate the computer spreadsheet model that lies at the core of Reclamation's decision making process because there is no description of the model's assumptions available. Only Reclamation and its contractors have this information and it has not been shared.

As a result, there is currently very little public confidence in the outcome of the KPOP process, nor can such confidence be expected. An interim plan would allow more time for the existing data gaps to be filled and for reviewers to be shown that, whether or not the outcome is agreeable to them, all relevant information has been presented and considered in the decision process.

* Internal federal review. An interim plan would also allow for proper internal review within the Department itself. The Tribes expect that Reclamation is hearing loud cries from sister agencies, particularly the BIA, who are asked to review lengthy documents in a very few working days. Such a timetable calls into question the adequacy of the review process.

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[1] These groups include the Klamath Forest Alliance, the Pacific Coast Federation of Fishermen's Associations, the Oregon Natural Resources Council, the California Sportfishing Protection Association, the Salmonid Restoration Federation, the Northcoast Environmental Center, and the Lane County Audubon Society. A copy of Balance's comments has been filed with Reclamation. We would be glad to furnish additional copies at your request.

* Interior's trusteeship obligations. Last, but of greatest importance, is the effect on the Secretary's trust responsibility to the Tribes. The Tribes expect the Secretary to act deliberately and after the most careful consideration to protect their water rights. In the current circumstances a rush to meet a self-imposed decision schedule will very likely compromise the Secretary's ability to discharge this duty and result in prejudice to tribal interests. Indeed, either option chosen from the current dilemma threatens further impairment of the already endangered tribal fishery. There is no need for haste, nor is there a compelling reason to so jeopardize either the Tribes' rights or the Secretary's fidelity to them. This is all the more important in light of the fact, explained in section 2 below, that the narrow question investigated in the USGS work cannot support the broad conclusions being drawn in the KPOP. Proceeding in reliance solely on that work, and in derogation of the Adjudication, is inconsistent with the trusteeship when other courses of action are available.

To summarize this first section, there is no need to rush to resolve the present dilemma presented by potentially conflicting Interior positions. The Tribes respectfully request that the Secretary and the agencies take advantage of the opportunity presented by a non-critical water year to proceed with an interim plan for 1996 and a deliberate review and reconciliation of all the interwoven demands inherent in such an important planning process.

2. <u>The current KPOP foundation, in particular the narrow investigation requested of USGS, does not support the conclusions being drawn from it, and does not justify compromising the Adjudication</u>.

Based on the information available to the Tribes[2] it appears that the KPOP will address, as it must, the important management question of whether Upper Klamath Lake surface elevation management is a useful tool to protect fisheries late in the water year. To date, it appears that the KPOP's answer will be "no." Unfortunately, this answer is based exclusively on a USGS investigation into a different and much narrower question altogether. This section will discuss, with the help of an analogy, the narrowness of the question put to USGS and why the response will not support the broad negative conclusion regarding lake surface elevation as a tool to protect fisheries.

<u>The narrow question, an analogy, and the broad conclusion</u>. One would have thought that the task assigned USGS would include an investigation of whether or not Upper Klamath Lake surface elevation management is a useful tool in promoting fishery well-being, that is, whether limnological mechanisms in the Lake cause surface elevation to be a useful tool toward that end. Such an investigation would have provided important guidance in designing Lake management techniques in the KPOP.

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[2] At this writing the KPOP documents are under internal review within the Department and have not been reviewed by the Tribes. This letter is based on discussions with field personnel during the course of development of the administrative record on which the KPOP documents are presumably based.

Unfortunately that question regarding limnological mechanisms that could promote fisheries – mechanisms that are affected by Lake surface elevation and that, therefore, make Lake surface elevation available as a tool for fishery management—was not assigned. Instead, USGS was only asked an extremely narrow question regarding whether it could readily see, as other investigators had seen, the effects of such mechanisms reflected in a limited data set. The USGS response to that assignment is not adequate, nor was it intended to be adequate, to resolving the broader management question.

> An analogy may be helpful. It is as though the Government is maintaining a garden and must determine the broad question of whether to invest in weeding and fertilizing in the belief that these are useful tools to promote plant productiviety. One would think the Government would simply ask its gardening advisor (USGS) to investigate that broad question by asking, "Are there chemical and biological mechanisms in the garden that make weeding and fertilizing useful tools to promote productivity?"
>
> Unfortunately, instead of asking the broad management question, the Government asks instead the much narrower question, "Is there a readily observable relation between, on the one hand, this data we have collected regarding the amount of weeding and fertilizing of the garden we have done over the last several years and, on the other, this associated data we have collected regarding the success of the garden in those years?"

> The investigator is answering, "I cannot readily observe such a relation. Some years relatively greater amounts of weeding and fertilizing produce relatively small crops. Some years relatively less weeding and fertilizing produce relatively larger crops. Maybe this is because the weather is a more important factor that your weeding and fertilizing."
>
> The Government then reaches the broad conclusion that weeding and fertilizing should not be employed because they are not useful management tools to promote garden productivity.

As the analogy illustrates, the narrow scope of the investigation is not sufficient to support the broad conclusion being drawn from it. It is case of the wrong question being asked or the wrong application of the answer being made. In either event, the outcome is not defensible and it certainly does not warrant compromising the Adjudication of the Tribes' water rights.

Moreover, it would squarely contradict the USGS work if the KPOP were to conclude that there are no linmological mechanisms that make Lake surface elevation a useful tool in fishery protection. The USGS work itself identifies such mechanisms.

For example, the USGS Executive Summary cites at least two such mechanisms in order to explain the occasions when such effects are, indeed, clearly observable. For example, the Summary specifies that "low lake level . . . may have contributed to the high phosphorus concentrations by way of enhanced internal loading" dut to high winds mixing sediment into the water column. (Executive Summary, p. 18 first full ¶.)

Similarly, it is said that "July lake level may have also contributed [to very low dissolved oxygen] by concentrating oxygen demanding material into a smaller water column." (Executive Summary, p. 18, top ¶.)

Moreover, in addition to the mechanisms cited in the USGS Executive Summary, the administrative record contains at least two other mechanisms showing that lake surface elevation must be considered as a fishery management tool. First, low late-season elevations heighten the risk of winter fish kill as snow covers the frozen lake driving dissolved oxygen to lethally low levels. A higher water column reduces this risk.

Second, very low late-season Lake surface elevations increase the risk of being unable to refill the Lake to meet the spawning-season surface elevations required elsewhere in the KPOP. Again, Lake surface elevation is not irrelevant as a management tool.

In sum, the USGS work cannot support, nor was it designed or intended by USGS to support, a KPOP conclusion that Lake surface elevation is not a useful management tool for protecting Upper Klamath Lake fisheries late in the water year. Both the USGS work and the rest of the administrative record contradict such a conclusion.

The salient point is, again, that the current posture of the KPOP proceedings does not warrant taking any steps that jeopardize the Department's position in the Klamath Basin Adjudication, much less steps that wold compromise the Tribes' water rights. Development of a 1996 interim water management plan for the Klamath Project is an appropriate next step for the Department.

Thank you for your consideration of this letter. We look forward to discussing these matters with you.

Very truly yours,

/s/ ELWOOD H. MILLER, JR.
ELWOOD H. MILLER, JR.
Director, Department of
Natural Resources

THE WHITE HOUSE

WASHINGTON

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies—the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal deparments and agencies should handle request for information in a

customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

/s/ WILLIAM J. CLINTON

Office of the Attorney General
Washington, D.C. 20530

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked each Federal deparment and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Department of Justice is fully committed to this directive and stands ready to assist all agencies as we implement this new policy.

First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such

harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective —maximum responsible disclosure of government information—while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures" whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOIA disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exempt information, *see* 5 U.S.C. § 552(b), and can lessen an agency's administrative burden at all levels of the administrative process and in litigation. I note that this policy is not

intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1981 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. § 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Department-wide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.

Finally I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies – especially those dealing with high-volume demands for particularly sensitive records—maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem—one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA-requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable.

/s/ JANET RENO